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WISCONSIN REPORTS

109

CASES DETERMINED

IN THE

SUPREME COURT

OF

WISCONSIN

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JUSTICES

OF THE

SUPREME COURT OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

JOHN B. CASSODAY,
Ex officio CHIEF JUSTICE.
JOHN B. WINSLOW,
ROUJET D. MARSHALL,
CHARLES V. BARDEEN,
JOSHUA ERIC DODGE.

Attorney General, - EMMETT R. HICKS.

Clerk, - - - CLARENCE KELLOGG.

ERRORS NOTED IN PREVIOUS VOLUMES.

VOL. 83.

Page xv. Insert *Stewart v. Stewart*. 364

VOL. 101.

Page 485, line 22. For 84 id. 153, read 84 id. 157.

VOL. 102.

Page 13, line 1. For Appellant, read Respondent.
" 13, " 2. For Respondent, read Appellant.
" 91, " —5. For *Manufacturers' & B. F. Ins. Co.* 96 Wis. 57, read *Niagara F. Ins. Co.* 96 Wis. 38.
Page 405, line 4. For 48 Wis. 33, read 48 Wis. 331.
" 405, " 5. For 9 Wis. 158, read 9 Wis. 166.
" 547, " —5. For 20 Wis. 255, read 20 Wis. 205.
" 575, " —5. For covenantee, read covenantor.
" 672, " 14. For 82 Wis. 351, read 82 Wis. 350.

VOL. 103.

Page 74, line 26. For opinion, read option.
" 166, " 13. For 22 Wis. 498, read 22 Wis. 522.
" 173, " 24. For plaintiff, read defendant.
" 206, " 1. For 20 Wis. 616, read 20 Wis. 586.
" 255, " 24. For *quo ad*, read *quoad*.
" 286, " —10. For 16 Wis. 689, read 16 Wis. 659.
" 344, " 13. For sec. 2302, read sec. 2304.
" 495, " 15. For by-law, and answers, read by-law and answer.
" 524, " 7. For names of defendant and relator, read name of defendant.
Page 620, line 17. For that should, read that he should.
" 663, " —5. For *Conrad v. Cole*, 15 Wis. 545, read *Clapp v. Preston*, 15 Wis. 543.

VOL. 104.

Page 52, line 17. For therein, read times therein.
" 336, " 25. For extend, read not extend.
" 489, " 16. For mortgagees, read mortgagors.
" 598, " 20. For 2 Am. & Eng., read 4 Am. & Eng.

VOL. 107.

Page 722. For 1012*b*, read 1210*b*.

TABLE

OF

CASES REPORTED.

Abresch Co., Johnston v. *182*
Ackerman, Rockman v. *639*
Allen v. Coe. *635*

Land contract: Foreclosure: Judgment by default: Conditions of redemption: Intervention: New trial: Discretion: Appeal.

Allen v. City of Fond du Lac *270*
American Fine Art Co., Hildebrand v. *171*
Appleton, City of, Davis v. *580*
Aschermann v. Hart. *38*

Garnishment: Agreement to pay debts of another: Election to sue original debtor.

Askew, Attorney General ex rel., v. Smith. *532*
Attorney General ex rel. Askew v. Smith. *532*

Waters: Lakes: Purpresture: Removal at suit of attorney general: Nuisance: Riparian rights: Railroads: Conveyance of land in fee: *Ultra vires.*

Baldwin, Town of, Patrick v. *342*
Bank of Commerce v. Elliott *648*

Bankruptcy: Actions pending in state courts: Intervention of trustee: Jurisdiction: Discontinuance: Pleading discharge: Enforcement of liens: Garnishment: Costs: Appeal: Orders subsequent to judgment.

Bank of West Superior, In re Assignment of *672*
Bartlett v. Collins. *477*

Contracts: Conflict of laws: Public policy: Gambling: Sale of grain on board of trade: Rules of board: Special verdict: Instructions to jury: Burden of proof.

Baum v. Baum *47*

Husband and wife: Agreement to separate and to assign insurance policy: Consideration: Public policy: Separate estate of wife.

Beck & Pauli Lith. Co. v. Nebraska City Cereal Mills *65*

Contracts: Evidence.

Bellack, Cook v *391*

Beyersdorf v. Cream City Sash & Door Co *456*

Master and servant: Negligence: Personal injury: Special verdict: Finding opposed to possibility: Sufficiency: Presumptions.

Bilot, Illinois Steel Co. v *418*

Blackman, Moore v *528*

Brown v. Chicago & Northwestern R. Co *384*

Railroads: Injury to person at street crossing: Contributory negligence: Failure to look and listen: Unlawful speed: Constructive intent to injure.

Brown v. Griswold *275*

Agency: Sale of land: Oral authority to make written contract: Appeal: Defective findings: Directing judgment: Specific performance: Form of judgment.

Bues, Gaertner v *165*

Bullen v. Milwaukee Trading Co *41*

(1) Trial: Submission of issues: Immaterial error. (2–4) Corporations: Contracts: *Ultra vires:* Authority of officers: Promissory notes.

Bulow v. Hetting *682*

Appeal: Exceptions.

Button v. Cole *247*

Replevin: Michigan statute: Death of plaintiff: Prosecution of suit by his sureties: Judgment binding on his estate.

Chamberlain v. Prudential Ins. Co *4*

Life insurance: Contracts: Independent oral agreement: Consideration: Evidence: Transaction with person since deceased.

Charles Abresch Co., Johnston v *182*

Charnley v. Shawano Water Power & River Imp. Co. . . 563

Waters: Improvement of river for logging: Height of dam: Flowage of lands: Compensation: Necessity of taking: Prescriptive rights: Navigable rivers: Lawfulness of dam.

Chicago & Northwestern R. Co., Brown v 384

Chicago & Northwestern R. Co., Malloy v 29

Chicago, St. Paul, M. & O. R. Co., Colburn v 377

Childs, State v 233

Chippewa Falls, City of, v. Hopkins 611

Municipal corporations: Highways: Removal of obstruction: Direction to commence proceedings: User: Discontinuance: Statute declaratory of common law: Effect of repeal: Estoppel: Pleading.

Churchill, Computing Scale Co. v 303

Coe, Allen v 635

Colburn v. Chicago, St. Paul, M. & O. R. Co 377

Practice: Objections to evidence: Purpose: Duty of court to indicate reason for ruling: Contracts: Breach: Damages: Evidence.

Cole, Button v 247

Collins, Bartlett v 477

Commo v. City of Fond du Lac 270

Computing Scale Co. v. Churchill 303

Setoff: Corporations: Succession: Written contracts: Oral modification: Pleading.

Consolidated Water Power Co. v. Nash 490

Corporations: Officers: Authority to convey entire property: Contracts: Arbitration: Signatures: Withdrawal: Mistake vitiating award: Specific performance: Judgment.

Cook v. Bellack 391

Married women: Ownership of land: Obstruction of street: Responsibility of husband: Equity.

Court of Honor of Illinois, In re 625

Cream City Sash & Door Co., Beyersdorf v 456

Curtis, Stubbings v 307

Dahlke, Egaard v 366

Davies v. Davies 129

Wills: Construction: "In trust:" Beneficial interest.

Davis v. City of Appleton 580

Municipal corporations: Actions against: Condition precedent: Limitation: Equitable relief: Conveyances: Reference to map: Adverse possession: Streets: Surveys: Estoppel: Structures not in aid of travel: Judgment.

Eastern R. Co., Remington v 154
Eastman, Martin v 286
Egaard v. Dahlke 366

(1-3) Judgment: Failure to dispose of entire controversy: Signature by clerk: Appeal: Demurrer sustained on inconsistent grounds. (4) School districts: Illegal purchase of site: Taxpayers' action: Pleading: Joinder of causes of action: Remedy at law: Demand, when necessary.

Elliott, Bank of Commerce v 648
Elton, Town of, Thomson v 589

Field, Gores v 408
Fitzgerald v. The State 677

Criminal law and practice: Burglary: New trial: Discretion.

Fond du Lac, City of, Allen and others v 270
Fond du Lac, City of, O'Connor v 253
Frye v. Village of Highland 292

Adverse possession: Permissive use of private way: Disseisin: Highways: Dedication: Intention.

Fuldner, The State ex rel. Heller v 56

Gaertner v. Bues 165

(1) Appeal: Bill of exceptions: Instructions to jury. (2-6) Landlord and tenant; Invalid writ of restitution: Duty of officer: Unnecessary injury: Removal of goods to warehouse: Constructive redelivery: Punitory damages: Malicious acts of officer: Ratification.

Gehring, Wambold v 122
Glenwood Mfg. Co. v. Syme 355

Corporations: Officers: Purchase of corporate notes for individual benefit: Collateral securities: Equity: Remedy at law: Laches: Pleading.

Goodvin v. Nichols 672

Gores v. Field 408

Banks and banking: Insolvency: Liability of officers for mismanagement: Action by creditors: Pleading: Joinder of causes of action: Limitation of actions: Clerical mistake in date: "Liability created by law:" Liability of cashier: Parties: Voluntary assignment.

Gores v. Murphy 408

Grimsrud v. Linley 632

Garnishment: Notes in hands of attorney: Attorney's lien: Justices' courts: Statutes construed.

Griswold, Brown v 275

Grover, Trogman v 393

Gudden, Linde v 326

Guhl v. Whitcomb 69

Railroads: Injury to traveler at highway crossing: Duty to look and listen: "Diversion of attention:" Evidence: Photographs of nude person.

Hart, Aschermann v 38

Havenor v. Pipher 108

Equity: Compelling conveyance of land: Resulting trusts: Mortgages: Laches.

Heath, Reindl v 570

Heinze v. South Green Bay Land & Dock Co 99

Corporations: Defective organization: Right to do business: Personal liability of stockholders: Estoppel: Officers: Authority to make contracts: Payment on stock: Presumptions: Court and jury.

Heller, State ex rel., v. Fuldner 56

Herman, Kane v 33

Hetting, Bulow v 682

Highland, Village of, Frye v 292

Hildebrand v. American Fine Art Co 171

(1, 2) Appeal: Review: Intermediate order. (3–9) Master and servant: Entire contract: Discharge for cause: Recovery for part performance.

Hinman v. City of Fond du Lac 270

Hoernig v. Hoernig 229

Divorce: Cruel and inhuman treatment: Division of estate.

Hopkins, City of Chippewa Falls v *611*
Hughes v. The State *397*

Criminal law and practice: Jurors: Qualification: Statements subsequent to verdict: Examination: Residence: Immaterial error: Murder: Dying declarations: Record: Presence of accused.

Illinois Steel Co. v. Bilot *418*

Waters: Title to lake bed: Patents, when void: Public trust: Adverse possession: Artificial filling: Ejectment: Riparian rights: Elements of actual possession: Statutes construed: Usual improvement: Hunting and fishing.

Illinois Steel Co. v. Jeka *449*
In re Bank of West Superior: Goodvin v. Nichols *672*

Mortgages: Release by parol: Estoppel: Banks and banking: Action of directors: Evidence: Records.

In re Court of Honor of Illinois *625*

Supreme court: Original jurisdiction, when exercised.

In re Luscombe's Will *186*

Wills: Joint trustees: Right to appeal: Refusal of one to join: Jurisdiction: Costs: Termination of trust: Happening of contingency: Proceedings by creditor to reach income of trust fund: Parties: Distribution of estate: Assignment by distributee.

Isenring, Milwaukee County v *9*

Jeka, Illinois Steel Co. v *449*
Johnston v. Charles Abresch Co *182*

(1) Money had and received: Recovery of insurance money from bailee. (2) Appeal: Presumption as to when motion for new trial was made.

Joint School District No. 1, State ex rel. Joint School District No. 8 v *313*
Juneau County v. Wood County *330*

Poor laws: Aid from soldiers' relief fund: Settlement.

Kane v. Herman *33*

Contracts: Guaranty: Release of one guarantor: Alteration of promissory note: Implied consent.

Kramer v. Willy 602

Master and servant: Death from boiler explosion: Negligence of repairer: Contributory negligence; Necessity of pressure test.

Kriesel, Scheer v 125

Liebermann v. Lippert 1

Sales: Breach of warranty: Evidence: Shortage in weight: Burden of proof.

Linde v. Gudden 326

Deeds: Execution: Evidence.

Linley, Grimsrud v 632

Lippert, Liebermann v 1

Luessen v. Oshkosh Electric Light & Power Co 94

Negligence causing death: Pleading: General and special damages: Parent and child.

Luscombe's Will, In re 186

Malloy v. Chicago & Northwestern R. Co 29

Limitation of actions: Notice of injury: Construction of statutes: Pleading.

Marks v. Schram 452

Promissory notes: Indorsement: Delivery in blank to maker: Alteration: Forgery: Ratification: Notice to payee.

Martens v. Reilly 464

Conspiracy: Civil action: Damages: Violation of contract: "Unlawful act."

Martin v. Eastman 286

(1, 2) Justices' courts: Appeal: Jurisdiction: Counterclaim. (3–6) Sales: Evidence: Election of remedies: Warranties: Issues: Special verdict.

McCann v. Ullman 574

Sale of horses: Warranty of soundness: Breach: Undeveloped disease: Expert testimony: Veterinary surgeons: Special damages: Verdict: Remission: New trial: Error in instructions: Exceptions.

McDonald, State v 506

McElroy v. Minnesota Percheron Horse Co. *116*

Appealable orders: Abuse of discretion: Jurisdiction: Duplicity in appeal.

McGibbon v. Walsh *670*

Pleading: Partnership: Assumption of debts by one partner: Witnesses: Refreshing recollection.

McKenna v. Van Blarcom *271*

Judgments: Docketing: Priority of liens: Tacking: Attorneys at law: Purchase of mortgage.

Miller, Mississippi River Logging Co. v. *77*

Milwaukee County v. Isenring *9*

Constitutional law: Statutes: General and local acts: Evidence as to passage and contents of bills: Legislative journals: Uniformity in county government: Sheriffs: Salaries.

Milwaukee Trading Co., Bullen v. *41*

Minnesota Percheron Horse Co., McElroy v. *116*

Mississippi River Logging Co. v. Miller *77*

Conditional sale of standing timber: Title not to pass until payment: Filing contract: Rights of *bona fide* purchaser: Estoppel.

Moore v. Blackman *528*

Limitation of actions: Open account: Independent transactions: Married women: Separate property: New promise: Account stated: Findings.

Murphy, Gores v. *408*

Nash, Consolidated Water Power Co. v. *490*

Nebraska City Cereal Mills, Beck & Pauli L. Co. v. ... *65*

Nelson v. City of Superior *618*

Municipal corporations: Superior city charter: Firemen are "officers:" Salary: Change during term: Agreement to accept less than legal salary: Estoppel: Appeal: Record.

Neshkoro, Town of, Portage County v. *520*

New Birdsall Co., Trapp v. *543*

Niagara F. Ins. Co., Temple v. *372*

Nichols, Goodvin v. *672*

Nichols v. City of Superior 643

(1) Appeal: Record: Exceptions. (2) Municipal corporations: Contracts for improvements: Abandonment: Completion of work by city: Offsets.

Nobles, State ex rel. Wheeler v 202

O'Connor v. City of Fond du Lac 253

(1-3) Action: Conditions precedent to right to sue and to remedy: Limitations: Waiver. (4, 5) Statutes: When take effect: "From and after" publication. (6-11) Municipal officers: Election and term of office: Power of legislature: Constitutional law.

Optenberg v. Skelton 241

Sales: Breach of warranty: Recouping damages: Appeal: Immaterial error: Judgment, when supported: Fact assumed by trial court as undisputed: Bill of exceptions.

Oshkosh, City of, Oshkosh Water Works Co. v 208

Oshkosh Electric L. & P. Co., Luessen v 94

Oshkosh Water Works Co. v. City of Oshkosh 208

Constitutional law: Impairing obligation of contract: Claims against city: Change in remedy: Performance of duty by officers.

Patrick v. Town of Baldwin 342

(1, 2) Justices' courts: Notice of appeal: Towns. (3-5) Poor laws: Support of pauper by private person: Liability of municipality: Implied contract.

Pereles, Wallace v 316

Pipher, Havenor v 108

Portage County v. Town of Neshkoro 520

Paupers: Relief of nonresidents: Reimbursement: Ultimate liability: Statutes: Construction: Amendment.

Prahl v. Town of Waupaca 299

Highways: Sufficiency: Court and jury: Evidence.

Prudential Ins. Co., Chamberlain v 4

Rahr, Rehbein v 136

Rehbein v. Rahr 136

Banks and banking: Certificate of incorporation: Intent of signers: Who are stockholders: Rescission: Nature and extent of individual liability to creditors: How enforced.

Reilly, Martens v. *464*
Reindl v. Heath *570*

Pleading: Joinder of causes of action: Contracts: Nature of lien action: Judgment.

Remington v. Eastern R. Co. of Minnesota *154*

Reference: Setting aside findings: Appeal: Partnership: Attorneys at law: Compensation: Unauthorized settlement of debt by one partner: Concealment: Collusion with debtor: Notice: Interest: Demand: Judgment: Mandate on appeal.

Rockman v. Ackerman *639*

Service by publication: Affidavit: Time of making: Jurisdiction: Mailing prior to order: Judgment by default: Proof of service: Waiver of lack of jurisdiction: Appeal: Undertaking.

Rosenkrans, Sheppard v *58*

Scheer v. Kriesel *125*

Boundaries: Apportionment of shortage in line: Fences: Trespass: Punitory damages.

Schlei v. Struck *598*

Boundaries: Surveys: Fences: Adverse possession: Estoppel: Court and jury: Evidence: Fences in adjoining section: Records of public officers: Admissibility: Appeal: Bill of exceptions.

Schram, Marks v. *452*
Schroeder v. City of Fond du Lac *270*
Shawano Water Power & R. Imp. Co., Charnley v. *563*
Sheppard v. Rosenkrans *58*

(1, 2) Landlord and tenant: Privilege of extending term: Statute of frauds: Notice: Waiver. (3, 4) Instructions to jury: Special verdict: Appeal: Exceptions.

Skelton, Optenberg v. *241*
Smith, Attorney General ex rel. Askew v. *532*
Smith, Underwood v. *334*
Smith, Woodward v. *607*
South Green Bay Land & Dock Co., Heinze v. *99*

State v. Childs 233

(1, 2) Collection of forfeitures: Justices' courts: Jurisdiction: Complaint. (3) Highways on town lines: Apportionment: Control.

State, Fitzgerald v 677

State, Hughes v 397

State v. McDonald 506

Criminal law and practice: Constitutional law: Trial: "District" where offense is committed: Illegal fishing: Catching fish for spawn: Agent of fish commissioners.

State ex rel. Heller v. Fuldner 56

(1) *Certiorari:* Conclusiveness of return. (2) Taxation: Board of review: Reduction of valuation.

State ex rel. Joint School District No. 8 v. Joint School District No. 1 313

Joint school districts: Division of property on creation of new districts: Parties to the determination.

State ex rel. Wheeler v. Nobles 202

School district treasurer: Resignation: Vacating office: Cannot be clerk: Statutes construed.

Struck, Schlei v 598

Stubbings v. Curtis 307

Conditional sale of standing timber: Reservation of title until payment: Rights of *bona fide* purchaser: Estoppel: Filing contract: Evidence: Cross-examination: Appeal: Exceptions.

Superior, City of, Nelson v 618

Superior, City of, Nichols v 643

Syme, Glenwood Mfg. Co. v 355

Temple v. Niagara Fire Ins. Co 372

Fire insurance: Standard policy: Option to rebuild: Valued policy clause.

Thomson v. Town of Elton 589

Municipal corporations: Money borrowed without authority: Implied contract to repay: *Ultra vires:* Pleading.

Trapp v. New Birdsall Co 543

(1) Special verdict: Undisputed facts: (3, 4) *Res adjudicata:* Several grounds of decision. (2, 5, 6) Sales: Breach of warranty: Notice: Waiver: Evidence.

Trelevan v. City of Fond du Lac 270

Trogman v. Grover 393

Constitutional law: Construction of statutes: Presumptions: Justices of the peace *de facto:* Jurisdiction.

Ullman, McCann v 574

Underwood v. Smith 334

Public lands: Surveys: "Corners:" "Boundary lines:" Meandered lake: "Due east and west."

Van Blarcom, McKenna v 271

Wallace v. Pereles 316

Husband and wife: Presumption of continuance of coverture: Conveyance by husband to wife: Covenants: Paramount title: Eviction: Judgment, when binding on covenantor: Notice.

Walsh, McGibbon v 670

Wambold v. Gehring 122

Mechanics' liens: Subcontractors: Sufficiency of notice: Building contract: "Extras:" Waiver.

Waupaca, Town of, Prahl v 299

Wheeler, State ex rel., v. Nobles 202

Whitcomb, Guhl v 69

Willy, Kramer v 602

Wood County, Juneau County v 330

Woodward v. Smith 607

Nonnegotiable instrument: Failure of consideration: Court and jury: Contracts: Performance: Mutuality.

TABLE

OF

CASES CITED BY THE COURT.

A. C. Conn Co. v. Little Suamico L. Mfg. Co. 74 W. 652 569
Adler v. Fenton, 24 How. 407 472, 473
Adams v. Beloit, 105 W. 363 - 227
Adamson v. Raymer, 94 W. 243 119
Allen v. Boberg, 108 W. 282 - 369
——— v. Galpin, 9 Barb. 246 504
——— v. Greene, 19 Ala. 34 - 323
——— v. La Fayette, 89 Ala. 641 - - - - - - 595
——— v. Wooley, 1 Blackf. 149 321
Anderton v. Milwaukee, 82 W. 279 - - - - - 17, 18
Andrews v. Thayer, 30 W. 228 141
Angle v. C., St. P., M. & O. R. Co. 151 U. S. 1 - - - - 475
Antoni v. Greenhow, 107 U. S. 769 - - - - - - 219
Archibald v. N. Y. C. & H. R. R. Co. 157 N. Y. 576 - - 442
Ashland v. C. & N. W. R. Co. 105 W. 398 - - - - - 588
Att'y Gen. v. Railway Cos. 35 W. 425 - - - - - 626, 627
——— v. Rice, 64 Mich. 385 - 25
Austin v. Rutland R. Co. 45 Vt. 215 - - - - - - 427

Babcock v. C. & N. W. R. Co. 107 W. 280 - - - - - 567
Badger v. Janesville C. Mills, 95 W. 599 - - - - - 462
——— v. U. S. *ex rel.* Bolles, 93 U. S. 599 - - - - - 205
Badger P. Co. v. Rose, 95 W. 145 - - - - - - 148
Baker v. State, 88 W. 140 - 403
Bank of Poughkeepsie v. Ibbotson, 24 Wend. 478 - - 151
Bardon v. McCall, 108 W. 181 90
Barnard v. Backhaus, 52 W. 593 - - 478, 483, 484, 487
Barnes v. Racine, 4 W. 454 - 568
Barney v. Keokuk, 94 U. S. 324 - - - - - - 427
Barnitz v. Beverly, 163 U. S. 118 - - - 212, 221, 224
Barrick v. Gifford, 47 Ohio St. 180 - - - - - 151, 152
Barth v. Koetting, 99 W. 243 - 362
Barthell v. Hencke, 99 W. 660 105
Bates v. Tappan, 99 Mass. 376 656, 657
Baxter v. C. & N. W. R. Co. 104 W. 307 - - - 43, 552
Beach v. Neenah, 90 W. 623 352, 353
Beadles v. McElrath, 85 Ky. 230 - - - - - - 487
Beard v. Dedolph, 29 W. 136 - 320
Beardsley v. Knight, 4 Vt. 471 321, 323
Becker v. Van Valkenburgh, 29 Barb. 319 - - - - 441
Beetham v. Lincoln, 16 Me. 137 348
Belden v. Hurlbut, 94 W. 562 142, 143, 145
Bell v. Shafer, 58 W. 223 - 552
Beloit & M. R. Co. v. Palmer, 19 W. 574 - - - 141, 142
Benjamin v. Houston, 24 W. 309 - - - - - - 345
Bent v. Hoxie, 90 W. 625 - 84
Benton v. Milwaukee, 50 W. 368 - - - - - - 259
Benware v. Pine Valley, 53 W. 527 - - - - 259, 260
Berliner v. Waterloo, 14 W. 378 - - - - 13, 14
Besant v. Wood, 12 Ch. Div. 605 - - - - - - 53

Bibb v. Allen, 149 U. S. 492 - 487
Bigelow v. Andress, 31 Ill. 322 661
——— v. Benedict, 70 N. Y. 202 485, 486
——— v. Washburn, 98 W. 553 260
Binz v. Weber, 81 Ill. 288 - 25
Bird C. & I. Co. v. Humes, 157 Pa. St. 278 - - - - - 362
Blackman v. Hawks, 89 Ill. 512 329
Blake v. Hawkins, 98 U. S. 315 133
Blakely v. Twining, 69 W. 238 306
Blewett v. Gaynor, 77 W. 378 163, 164
——— v. McRae, 88 W. 280 - 185
Blood v. Mercelliott, 53 Pa. St. 391 - - - - - - - 20
Blossom v. Ferguson, 13 W. 75 245
Bockes v. Hathorn, 78 N. Y. 222 - - - - - - 196
Bolin v. C., St. P., M. & O. R. Co. 108 W. 333 - - - - - 389
Bourgeois v. N. W. Nat. Ins. Co. 86 W. 606 - - - 376
Bowe v. St. Paul, 70 Minn. 341 622
Bowen v. Hall, 6 Q. B. Div. 333 476
Bowman v. Harding, 56 Me. 559 - - - - - 656, 657
Boyle, *In re*, 9 W. 264 - - 395
Brabbits v. C. & N. W. R. Co. 38 W. 298 - - - - - 168
Bradley v. Eau Claire, 56 W. 168 - - - - - - 260
Bradly v. Marine & R. P. M. & M. Co. 3 Hughes, 26 - - 364
Bramhall v. Ferris, 14 N. Y. 41 199
Brandon v. State, 16 Ind. 197 - 20
Brauchle v. Nothhelfer, 107 W. 457 - - - - - - 246
Brauer v. Portland, 35 Oreg. 471 - - - - - - 623
Brayton v. Chase, 3 W. 456 - 578
Breitenbach v. Bush, 44 Pa. St. 313 - - - - - - 221
Bridge v. Ward, 35 W. 687 - 199
Briggs v. Penniman, 8 Cow. 387 - - - - - - 151
Brinckerhoff v. Bostwick, 99 N. Y. 185 - - - - - 414
Broadway Nat. Bank v. Adams, 133 Mass. 170 - - - 199
Brodhead v. Milwaukee, 19 W. 624 - - - - - - 593
Bronson v. Kinzie, 1 How. 311 215, 218, 221
Brown v. C. & N. W. R. Co. 102 W. 137 - - - 431, 555
——— v. Swineford, 44 W. 282 76
Browning v. Marvin, 100 N. Y. 144 - - - - - - 274
Brundage v. Monumental G. & S. M. Co. 12 Oreg. 322 - 151
Bryan v. Adler, 97 W. 124 - 171
Buchner v. C., M. & N. W. R. Co. 60 W. 264 - - - 555
Buffalo & N. Y. C. R. Co. v. Dudley, 14 N. Y. 336 - - 148
Bull v. Ky. Nat. Bank, 90 Ky. 452 - - - - - - - 199
Bunn v. Valley L. Co. 51 W. 376 - - - - - - 89
Burke, *In re*, 76 W. 357 - - 395
Burnham v. Milwaukee, 100 W. 55 - - - - - - 503
Burtners v. Keran, 24 Grat. 42 323
Bush v. Sprague, 51 Mich. 41 472
Cadle v. McLean, 48 W. 636 - 89
Cahoon v. Morgan, 38 Vt. 234 661
Calteaux v. Mueller, 102 W. 525 497
Camp v. Gifford, 7 Hill, 169 - 665
Carlisle v. Blamire, 8 East, 487 322
Carlson v. St. Louis River D. & I. Co. 41 L. R. A. 371 - 569
Carmody v. Mulrooney, 87 W. 552 - - - - - - 298
Carpenter v. Tatro, 36 W. 297 320
Carroll v. C., B. & N. R. Co. 99 W. 399 - - - - - - 463
Case P. Works v. Niles & Scott Co. 90 W. 590 - - 245, 292
——— v. ———, 107 W. 9 - 245
Castello v. Landwehr, 28 W. 522 - - - - 13, 16
Cathcart v. Comstock, 56 W. 590 - - - - - 16, 17
Cawley v. La Crosse City R. Co. 101 W. 145 - - 74, 462
Chappell v. Oregon, 36 W. 145 302
Charlestown v. Lunenburgh, 23 Vt. 525 - - - - - - 347
Chicago v. Hesing, 83 Ill. 204 97
Chicago, M. & St. P. R. Co. v. Milwaukee, 97 W. 418 - - 239
Chicago & N. W. R. Co. v. Langlade Co. 56 W. 614 - 17
Chipman v. Tucker, 38 W. 43 141, 142
Clancey v. Houdlette, 39 Me. 451 - - - - - - 442
Clark v. Janesville, 10 W. 136 - - - - 12–14, 18
——— v. Martin, 49 Pa. St. 299 221, 224
——— v. Potter, 32 Ohio St. 64 445

Clark v. State, 142 N. Y. 101 - 622
Clarke v. Cold Spring O. H. Co. 58 Minn. 16 - - - - - 151
——— v. Milwaukee Co. 53 W. 65 - - - - - - - 624
Clasgens Co. v. Silber, 87 W. 357 - - - - - - 576
Cobb v. Davenport, 32 N. J. Law, 369 - - - - - 447
——— v. Prell, 15 Fed. Rep. 774 484
Coburn v. Ames, 52 Cal. 385 427
Cohn v. Wausau B. Co. 47 W. 314 - - - - - - 540
Coleman v. White, 14 W. 700 - 140, 151
Collette v. Weed, 68 W. 428 - 260
Collins v. Cowan, 52 W. 634 - 571, 572
Commercial Bank v. Azotine Mfg. Co. 66 Minn. 413 - - 154
——— v. Warren, 15 N. Y. 577 456
Comm. v. Loring. 8 Pick. 370 32
——— v. Waterman, 122 Mass. 43 - - - - - - - 472
Conn Co. v. Little Suamico L. Mfg. Co. 74 W. 652 - - 569
Cooban v. Bryant, 36 W. 605 - 289
Cook v. Berlin W. M. Co. 43 W. 433 - - - - - - 361
Coorsen v. Ziehl. 103 W. 381 - 124
Cornell v. Hichens, 11 W. 368 213, 220
Cotzhausen v. Judd. 43 W. 213 163
Craker v. C. & N. W. R. Co. 36 W. 657 - - - - - 171
Cramer v. Hanaford, 53 W. 85 280, 647
Crane v. Hearn, 26 N. J. Eq. 381 - - - - - - 196
Crawford v. Branch Bank, 7 How. 279 - - - - - 218
——— v. Spencer, 92 Mo. 498 - 486
Crease v. Babcock, 10 Met. 525 150
Crerar v. M. & St. P. R. Co. 35 W. 67 - - - - - - 119
Crosthwaite v. U. S. 30 Ct. Cl. 300 - - - - - - 162
Crouch v. Culbreath, 11 Rich. Law, 9 - - - - - - 577
Cullom v. Mock, 21 La. Ann. 687 - - - - - - 162
Cummings v. Nat. F. Co. 60 W. 603 - - - - - - 463
Cunningham v. Wechselberg, 105 W. 359 - - - 371, 413
Curtis v. Morrow, 24 W. 664 - 218
——— v. Whitney, 13 Wall. 68 218
Cutlip v. Sheriff of Calhoun Co. 3 W. Va. 588 - - - 20
Dair v. U. S. 16 Wall. 1 - - 143
Dakota v. Winneconne, 55 W. 522 - - - 350, 351, 353
Davis v. Scott, 59 W. 604 346, 347, 350, 351
Davis' Sons v. Butrick, 68 Iowa, 94 - - - - - 556
Dean v. Borchsenius, 30 W. 236 27
De Boest v. Gambell, 35 Oreg. 368 - - - - - - 623
De Morris v. Wilbur L. Co. 98 W. 465 - - - - - - 573
Devlin v. O'Neill, 6 Daly, 305 87
Devore v. Sunderland, 17 Ohio, 52 - - - - - - - 323
Dickinson v. Norwegian P. Co. 101 W. 157 - - - 181
Diefenback v. Stark, 56 W. 462 178, 180
Dodge v. Hopkins, 14 W. 630 - 279
——— v. O'Dell's Estate, 106 W. 296 - - - - - - 601
Doud v. W., P. & S. R. Co. 65 W. 108 - - - - - - 371
Douglas Co. v. Walbridge, 38 W. 179 - - - - - - 371
Douglass v. State, 4 W. 387 - 568
Dowagiac Mfg. Co. v. Schroeder, 108 W. 109 - - - 7
Doyle v. Welch, 100 W. 24 - 484
Draper v. Shoot, 25 Mo. 197 - 445
Duluth, S. S. & A. R. Co. v. Douglas Co. 103 W. 75 - 676
Duncan, *In re*, 139 U. S. 449 26, 27
Duncan v. Cobb, 32 Minn. 460 262
Durkee v. Janesville, 26 W. 697 13, 14, 16, 17, 23
Dutton v. Dutton, 30 Ind. 452 55
Dyer v. U. S. 20 Ct. Cl. 166 - 622
Early v. Chippewa L. Co. 68 W. 112 - - - - - 503, 504
East Hampton v. Kirk, 84 N. Y. 215 - - 428, 441, 442
East Missouri v. Horseman, 16 U. C. Q. B. 556 - - - 472
Eaton v. Lyman, 26 W. 61 - 324
——— v. ———, 33 W. 34 - 324
Eau Claire Nat. Bank v. Benson, 106 W. 624 - - 140, 153
——— v. Macauley, 101 W. 304 214, 221
Edleman v. Kidd, 65 W. 18 - 246
Edwards v. Kearzey, 96 U. S. 595 - - - - - - 218
Eldred, *In re*, 46 W. 530 - 514, 515, 568
Ettrick v. Bangor, 84 W. 259 - 333

Evans v. Browne, 80 Ind. 514 - 26
——— v. Rugee, 63 W. 32 578
——— v. Sharp, 29 W. 564 13, 15, 22
Everts v. Agnes, 4 W. 343 141, 142
Ewing's Lessee v. Burnet, 11 Pet. 41 - - - - 443

Fairchild v. Dean, 13 W. 329 - 120
Fairfield v. Barrette, 73 W. 463 - - - - - - 601
Falkner v. Hunt, 76 N. C. 202 665
Farr v. Semple, 81 W. 230 - 164
Farwell Co. v. Wolf, 96 W. 10 45, 541
Fay v. Lovejoy, 20 W. 407 - 185
Fellows v. Hall, 3 McLean, 487 665
Fenelon v. Hogoboom, 31 W. 172 - - - - - - 320
Fillingham v. Nichols, 108 W. 49 - - - - - - 328
Finkelston v. C., M. & St. P. R. Co. 94 W. 270 - - - 246
Finney v. Guy, 106 W. 256 - 140, 151, 153
First Nat. Bank v. Gay, 63 Mo. 33 - - - - - - 456
——— v. Winona P. Co. 53 Minn. 167 - - - - 151
Fisk v. Tank, 12 W. 276 - - 245
Fitzgerald v. Fuller, 19 Hun, 180 - - - - - - 87
Florentine v. Barton, 2 Wall. 210 - - - - - - 218
Flynn v. State, 97 W. 44 - 404
Focke v. Blum, 82 Tex. 436 - 661
Fondren v. Durfee, 39 Miss. 324 577
Ford v. Hill, 92 W. 188 44, 105, 497
Forsyth v. Day, 46 Me. 176 - 456
Foster v. Posson, 105 W. 99 153, 413
Fouke v. Fleming, 13 Md. 392 26
Frasier v. Banks, 11 La. Ann. 31 665
French v. State, 85 W. 400 - 405
Fryer v. Warne, 29 W. 511 - 297
Fuller v. Worth, 91 W. 406 - 601

Gager v. Marsden, 101 W. 598 412
Galesville v. Parker, 107 W. 363 - - - - - - 601
Gardner v. Collector, 6 Wall. 499 - - - - - - 26
Garing v. Fraser, 76 Me. 37 - 472
Garland v. Garland, 87 Va. 758 199
Garrison v. Howe, 17 N. Y. 458 151
Gaskin v. Meek, 42 N. Y. 186 - 20, 21
Gatzow v. Buening, 106 W. 1 31, 245
Gause v. Clarksville, 5 Dill. 165 595
Gaw v. Bennett, 153 Pa. St. 247 487
Gear v. Bracken, 1 Pin. 249 - 504
George v. Everhart, 57 W. 397 217
German Bank v. Muth, 96 W. 342 - - - - - - 328
Gettelmann v. Gitz, 78 W. 439 320
Gianella v. Bigelow, 96 W. 185 152
Gill v. M. & L. W. R. Co. 76 W. 293 - - - - - - 566
Globe M. Co. v. Boynton, 87 W. 619 - - - - - - 659
Goldsmith v. Darling, 92 W. 363 - - - - - - 675
Goodspeed v. Cutler, 75 Ill. 534 456
Goodyear R. Co. v. George D. Scott Co. 96 Ala. 439 - - 498
Gores v. Day, 99 W. 276 - 411, 415
Gorr v. Mittlestaedt, 96 W. 296 302
Graves v. State, 12 W. 591 - 168
Gray v. Bartlett, 20 Pick. 186 427
Greene v. Nunnemacher, 36 W. 50 - - - - - - 568
Greene & B. Co. v. Remington, 72 W. 648 - - - - 40
Grottkau v. State, 70 W. 462 - 168

Hacker v. Stevens, 4 McLean, 535 - - - - - - 661
Halaska v. Cotzhausen, 52 W. 624 - - - - - - 162
Hall v. Banks, 79 W. 229 214, 221
——— v. Williams, 120 Mass. 344 - - - - - - 199
Hamilton v. Menominee Falls Q. Co. 106 W. 352 - - 280
——— v. Royal Ins. Co. 156 N. Y. 336 - - - - - 376
Hansen v. Martin, 63 Cal. 282 162
Hanson v. Taylor, 23 W. 547 - 616
Hardee v. Wilson, 146 U. S. 179 - - - - 194, 195
Harkness v. Russell, 118 U. S. 663 - - - - - - 85, 86
Harrington v. Roberts, 7 Ga. 510 - - - - - - - 194
Harris v. Tumbridge, 83 N. Y. 93 - - - - - - - 486
Harrison v. Milwaukee Co. 51 W. 645 - - - - - - 16
Hart v. Moulton, 104 W. 349 - 555
Harter v. Christoph, 32 W. 245 328
Hasbrouck v. Shipman, 16 W. 296 - - - - - 214, 221
Haskins v. Royster, 70 N. C. 601 - - - - - - 476
Hawes v. Mooney, 39 Conn. 37 661
Haywood v. Lincoln L. Co. 64 W. 639 - - - - - - 361
Hein v. Fairchild, 87 W. 258 - 302

Henckel v. Wheeler & W. Mfg. Co. 51 W. 363 - - - 289
Henry v. Tilson, 17 Vt. 479 - 32
Herrick v. Wardwell, 58 Ohio St. 294 - - - - - 151, 152
Hiawatha I. Co. v. John Strange P. Co. 106 W. 111 - 105
Higgins v. Lansingh, 154 Ill. 301 - - - - - - 362
Hildman v. Phillips, 106 W. 611 - - - - - - 245
Hill v. Am. S. Co. 107 W. 19 - 280
——— v. Fond du Lac, 56 W. 244 - - - - - - 258
Hillsdale College v. Thomas, 40 W. 661 - - - - 141
Hinz v. Van Dusen, 95 W. 503 361
Hobbs v. McLean, 117 U. S. 576 - - - - - - 485
——— v. Yonkers, 102 N. Y. 13 623
Hobkirk v. Phœnix Ins. Co. 102 W. 16 - - - - - - 376
Hoffman v. Maffioli, 104 W. 630 610
Hollister Bank, *In re*, 27 N. Y. 393 - - - - - - 150
Holmes v. Sherwood, 16 Fed. 725 - - - - - - 151
Hook v. Stovall, 21 Ga. 72 - 577
Horner v. Spelman. 78 Ill. 206 665
Horton v. Dewey, 53 W. 410 - 320
Howland v. Blake. 97 U. S. 624 329
Huebschmann v. Cotzhausen, 107 W. 64 - - - - - 194
Huganir v. Cotter, 102 W. 323 185
Hull v. Augustine, 23 W. 383 481
Humboldt Co. v. Churchill Co. Comm'rs, 6 Nev. 30 - - 20
Hunter v. Bosworth, 43 W. 583 195
Hurlbut v. Marshall, 62 W. 590 409, 417, 418
Hussa v. Sikorski, 101 W. 131 245
Hutchins v. Hutchins, 7 Hill, 104 - - - - - - 472
Huttley v. Simmons, [1898] 1 Q. B. Div. 181 - - - - 473
Hyde v. German Nat. Bank, 96 W. 406 - - - - - 368
Hyland v. Bohn Mfg. Co. 92 W. 157 - - - - - - 84

Illinois C. R. Co. v. Illinois, 146 U. S. 387 - - - - - 427
Illinois S. Co. v. Budzisz, 106 W. 499 - - - - - - 428
——— v. Bilot, 109 W. 418 449, 451
Inglehart v. Thousand Island H. Co. 32 Hun, 377 - - 364
——— v. ———, 109 N. Y. 454 364
Ingraham v. Phillips, 1 Day, 117 - - - - - - 657
Ingram v. Rankin, 47 W. 406 578
Iowa Co. v. Mineral Point R. Co. 24 W. 93 - - - - 596
Irwin v. Williar, 110 U. S. 499 487

Jackson v. State. 92 W. 422 - 681
Jamison v. Adler-Goldman Co. 59 Ark. 548 - - - 193
Jeffersonville v. Weems, 5 Ind. 547 - - - - - - 32
J. & H. Clasgens Co. v. Silber, 87 W. 357 - - - - 576
J. I. Case P. Works v. Niles & Scott Co. 90 W. 602 - 245, 292
——— v. ———, 107 W. 9 - 245
John Pritzlaff H. Co. v. Berghoefer, 103 W. 359 - - 503
Johnson v. Goult, 106 W. 247 - 159
——— v. Huber, 106 W. 282 - 165
——— v. Van Velsor, 43 Mich. 208 - - - - - - 329
John V. Farwell Co. v. Wolf, 96 W. 10 - - - 45, 541
Jones v. Jefferson, 66 Tex. 576 205
——— v. Jones, 71 W. 520 - 280
——— v. Lellyett, 39 Ga. 64 - 657
——— v. Lind, 79 W. 64 - 352, 353
——— v. Stanly, 76 N. C. 355 476
——— v. U. S. 137 U. S. 202 26, 27
——— v. Walker, 22 W. 220 - 119
Jordan v. Swift I. & S. Works, 13 Ky. L. Rep. 970 - - 162
J. S. Keator L. Co. v. St. Croix B. Corp. 72 W. 88 - - 511

Keator L. Co. v. St. Croix B. Corp. 72 W. 88 - - - 511
Kehn v. State, 93 N. Y. 291 - 622
Kelley v. Madison, 43 W. 638 258
Kellogg v. Steiner, 29 W. 626 141
Kemp v. Seely, 47 W. 687 - 280
Kennedy v. Waugh, 23 W. 468 119
Kenner v. Harding. 85 Ill. 264 577
Kercheval v. Doty, 31 W. 476 328
Killen v. Barnes, 106 W. 546 - 154, 412
Killips v. Putnam Ins. Co. 28 W. 472 - - - - - - 168
Kimball v. Harmon, 34 Md. 407 472
Kingman & Co. v. Watson, 97 W. 596 - - - - - - 556
Kinney v. Dexter, 81 W. 80 - 320
Kittredge v. Warren, 14 N. H. 509 - - - - - - 657
Kliefoth v. N. W. I. Co. 98 W. 425 - - - - - - 597

Knox v. Chaloner, 42 Me. 150 568
Koehler v. Black River Falls I. Co. 2 Black, 715 - - 362
Koester v. C. & N. W. R. Co. 106 W. 460 - - - - - 74
Kollock v. Scribner, 98 W. 104 63
Koshkonong v. Burton, 104 U. S. 668 - - - - - 218

Lackner v. Turnbull, 7 W. 105 573
La Crosse City R. Co. v. Higbee, 107 W. 389 - - - - 588
Lafebre v. Board of Education, 81 W. 660 - - - - - 593
Lally v. Rossman, 82 W. 147 - 341
Lamb v. State, 36 W. 424 - 404
Lampman v. Van Alstyne, 94 W. 417 - - - 298, 428, 447
Land. L. & L. Co. v. McIntyre, 100 W. 245 - - - 371, 415
Landon v. Burke, 33 W. 452 - 119
Larew v. Newman, 81 Cal. 588 622
Larson v. Furlong, 63 W. 323 540
Lawrence v. Gullifer, 38 Me. 532 - - - - - - - 178
——— v. Vilas, 20 W. 381 - 306
Lawson v. M. & N. R. Co. 30 W. 597 - - - - - 14, 15
Lawton v. Howe, 14 W. 246 - 184
——— v. Waite, 103 W. 244 - 18
Laycock v. Parker, 103 W. 161 164
Leary v. Leary, 68 W. 662 - 668
Lederer v. Estate of Kohn, 100 W. 662 - - - - - - 647
Lee v. Buckheit, 49 W. 54 - 214, 217, 224
Leigh Bros. v. M. & O. R. Co. 58 Ala. 165 - - - - - 87
Leighton v. Kelsey, 57 Me. 85 656, 657
Lemon v. Hayden, 13 W. 159 - 616
Leverty v. Vanarsdale, 65 Pa. St. 507 - - - - - - 472
Lewenberg v. Hayes, 91 Me. 106 87
Lightfoot v. Cole, 1 W. 26 213, 214, 216
Lillie v. Dunbar, 62 W. 198 84, 86, 87, 90
Limited I. Asso. v. Glendale I. Asso. 99 W. 54 - - - - 184
Liverpool & G. W. S. Co. v. Phenix Ins. Co. 129 U. S. 397 482
Lockhart v. Fessenich, 58 W. 588 - - - - - - - 31
Lofdahl v. M., St. P. & S. S. M. R. Co. 88 W. 421 - - - 74
Lombard v. McMillan, 95 W. 627 - - - - - - 260
Louisiana v. New Orleans, 102 U. S. 203 - - - - 219, 227
——— v. Wood, 102 U. S. 294 595
Lovass v. Olson, 92 W. 616 - 132
Lumley v. Gye, 2 El. & Bl. 216 - - - - - - - 476
Lusk v. Galloway, 52 W. 164 119
Lyons v. Woods, 153 U. S. 649 26

Maanum v. Madison, 104 W. 272 - - - - - - - 246
Mace v. Reed, 89 W. 440 - - 171
Maldaner v. Smith, 102 W. 30 280, 456
Malloy v. C. & N. W. R. Co. 109 W. 29 - - - - - 259
Manwarring v. Kouns, 35 Tex. 171 - - - - - - - 665
Mappes v. Iowa Co. 47 W. 31 346, 350
Marsh v. Fraser, 27 W. 596 - 573
Martens v. O'Conner, 101 W. 18 - - - - - - - - 470
Martin v. Gordon, 24 Ga. 533 - 323
Mass. L. & T. Co. v. Welch, 47 Minn. 183 - - - - - 556
Mathers v. Union M. A. Asso. 78 W. 588 - - - - - 4, 8
Mathews v. Ripley, 101 W. 100 289
Mathie v. McIntosh, 40 W. 120 396
Matteson v. Ellsworth, 28 W. 254 - - - - - - - 365
Mattison v. Jones, 9 How. Pr. 152 - - - - - - - 195
Maxwell v. Bank of New Richmond, 101 W. 286 - - - 659
May v. Courtnay, 47 Ala. 185 657
Mayor of Carlisle v. Blamire, 8 East, 487 - - - - - 322
Maysville & L. R. Co. v. Herrick, 13 Bush, 122 - - 33
McAlpine v. St. Clara F. Academy, 101 W. 468 - - - 503
McArthur v. Scott, 113 U. S. 340 - - - - - - 201
McCadden v. Abbot, 92 W. 551 72, 74
McCaffrey v. Shields, 54 W. 645 - - - - - 350, 353
McCarville v. Boyle, 89 W. 651 119
McCaul v. Thayer, 70 W. 138 - 32
McChesney v. McChesney, 91 W. 268 - - - - - - 232
McConnell v. Denham, 72 Iowa, 494 - - - - - 661
McCormick v. Cleveland, 98 W. 522 - - - - - - 395
——— v. Rusch, 15 Iowa, 127 - 221
McCown v. Russell, 84 W. 122 635

McCullough v. Virginia, 172 U. S. 102 - - - 215, 219
McDonald v. State, 80 W. 407 25
McElroy v. Minn. P. H. Co. 109 W. 116 - - 44, 45, 639
McGahey v. Virginia, 135 U. S. 685 - - - - - - 222
McGarry v. Lewis C. Co. 93 Mo. 237 - - - - - - 661
McGinley v. Laycock, 94 W. 205 - - - - - - 261
McGoodwin v. Stephenson, 11 B. Mon. 21 - - - - - 322
McHenry v. Sneer, 56 Iowa, 649 - - - - - - 472
McInery v. Galveston, 58 Tex. 334 - - - - - - 628
McInnis v. Lyman, 62 W. 191 323
McKinney v. C. & N. W. R. Co. 87 W. 284 - - 72, 74
McKinnon v. Vollmar, 75 W. 82 - - - - - - - 506
McLennan v. Prentice, 77 W. 124 - - - - - - 323
——— v. ———, 85 W. 427 291, 427, 539
McLimans v. Lancaster, 57 W. 297 - - - - - - 578
Medbury v. Swan, 46 N. Y. 200 665
Meisenheimer v. Kellogg, 106 W. 30 - - - - - 31, 259
Mendota Club v. Anderson, 101 W. 479 - - - - - 539
Messer v. Oestreich, 52 W. 684 541
Meyer v. Prairie du Chien, 9 W. 233 - - - - 346, 353
Miles v. Mut. R. F. L. Asso. 108 W. 421 - - - - - - 274
Miller v. Bayer, 94 W. 123 - 597
——— v. Rouse, 8 Minn. 124 - 365
——— v. State, 25 W. 384 - 405
Mills v. Charlton, 29 W. 400 13, 15
——— v. Jefferson, 20 W. 54 13, 14
Milwaukee B. Co. v. Duncan, 87 W. 124 - - - - - 292
Milwaukee Co. v. Sheboygan, 94 W. 58 - - - - - 521
Milwaukee & M. R. Co. v. Finney, 10 W. 388 - - - 171
Mississippi River L. Co. v. Miller, 109 W. 77 - - - 311
Mitchell v. Clark, 110 U. S. 633 218
Mogul S. S. Co. v. McGregor, 23 Q. B. Div. 616 - - - 473
Mohr v. Miesen, 47 Minn. 228 487
Montague's Adm'r v. Massey, 76 Va. 307 - - - - 622
Morford v. Unger, 8 Iowa, 82 20
Morgan v. N. O., M. & T. R. Co. 2 Woods, 244 - - - 482
Morris Run C. Co. v. Barclay C. Co. 68 Pa. St. 187 - - 472
Morse v. Gilman, 16 W. 504 - 597
Muller, *In re*, Deady, 513 - 660
Munger v. Lenroot, 32 W. 541 572
Munson v. B., H. & E. R. Co. 120 Mass. 81 - - - 657
Musbach v. Wis. C. Co. 108 W. 57 - - - - - - 246, 463
Mygatt v. Coe, 147 N. Y. 456 - 322
——— v. ———, 152 N. Y. 457 322, 323, 392

Nat. Bank v. Taylor, 120 Mass. 124 - - - - - - 665
Nat. D. Co. v. Seidel, 103 W. 489 - - - - 655, 656
Nat. T. Co. v. Gleason, 77 N. Y. 400 - - - - - - 184
Neifing v. Pontiac, 56 Ill. 172 20
Nelson v. Rountree, 23 W. 367 214, 221
Ne-pee-nauk Club v. Wilson, 96 W. 290 - - - 427, 438
New Home S. M. Co. v. Simon, 104 W. 120 - - - - 143
Newman v. Kershaw, 10 W. 333 - - - - - - 481
——— v. Reagan, 63 Ga. 755 - 179
Newton v. Marshall, 62 W. 8 - 286
——— v. Williams, 94 W. 222 647
New York v. Colgate, 12 N. Y. 140 - - - - - - 23
New York Central & H. R. R. Co. v. Aldridge, 135 N. Y. 83 - - - - - - 541
Nichol v. Alexander, 28 W. 118 323
Nichols v. Eaton, 91 U. S. 716 199
Nichols & S. Co. v. Chase, 103 W. 570 - - - - - 556
Nickell v. Handly, 10 Grat. 336 199
Nixon v. C., R. I. & P. R. Co. 84 Iowa, 331 - - - - 73
Nolan v. M., L. S. & W. R. Co. 91 W. 16 - - - 72, 74
Noonan v. Orton, 30 W. 609 - 120
North Star B. & S. Co. v. Ladd, 32 Minn. 381 - - - 661
Northwestern F. Co. v. Lee, 102 W. 426 - - - 105, 497
Northwestern M. L. Ins. Co. v. Neeves, 46 W. 147 - 214, 217
——— v. Park H. Co. 37 W. 125 - - - 194, 195, 197
North Whitehall v. South Whitehall, 3 Serg. & R. 117 349

Oatman v. Bond, 15 W. 20 - 213, 220, 225
O'Brien v. C., St. P., M. & O. R. Co. 102 W. 628 - - 462
O'Connell v. Smith, 101 W. 68 119
O'Connor v. Fond du Lac, 109 W. 258 - - - 270, 271, 587
O'Donnell v. Brand, 85 W. 97 - 673
O'Hara v. MacConnell, 93 U. S. 150 - - - - - - 201
——— v. Park River, 1 N. Dak. 279 - - - - - - 623
Orton v. Noonan, 25 W. 672 - 31
Oshkosh G. L. Co. v. Germania F. Ins. Co. 71 W. 454 - - 375
Oshkosh W. W. Co. v. Oshkosh, 106 W. 83 - - - 211
Otis v. Strafford, 10 N. H. 352 354
Overseers v. Overseers, 3 Serg. & R. 117 - - - - 349

Paine v. Woodworth, 15 W. 298 - - - - 214, 217
Paine L. Co. v. Oshkosh, 89 W. 449 - - - - - - 588
Park v. Richardson & B. Co. 81 W. 399 - - - - 291
Parkinson v. Brandenburg, 35 Minn. 294 - - - - - 262
Patry v. C., St. P., M. & O. R. Co. 77 W. 218 - - - 171
Paul, *In re*, 94 N. Y. 497 - 21, 24
Paul v. Kenosha, 22 W. 266 593, 594, 597
Peabody v. Maguire, 79 Me. 572 - - - - - - 90
Peck, *In re*, 16 N. B. R. 43 - 661
Peninsular L. & C. Works v. Union O. & P. Co. 100 W. 488 - - - 214, 215, 221
Penniman's Case, 103 U. S. 714 218
People v. O'Brien, 38 N. Y. 193 - - - - - 20, 21
——— v. Richards, 1 Mich. 216 474
——— v. Vanderbilt, 26 N. Y. 287 - - - - - - 542
People *ex rel.* Barnes v. Starne, 35 Ill. 121 - - - - - 26
——— Bolton v. Albertson, 55 N. Y. 50 - - - 266, 268
——— Brown v. Woodruff, 32 N. Y. 355 - - - - - 266
——— Davies v. Comm'rs of Taxes, 47 N. Y. 501 - - 20
——— Fowler v. Bull, 46 N. Y. 57 - - - - - - 266, 268
——— I. M. R. Co. v. Sup'rs, 100 Ill. 332 - - - 205, 207
People *ex rel.* Keal v. Wayne Circuit Judge, 36 Mich. 331 195
——— Le Roy v. Foley, 148 N. Y. 677 - - - 266, 269
——— Loew v. Batchelor, 22 N. Y. 128 - - - 266, 268
——— McConville v. Hills, 35 N. Y. 449 - - - 20, 23
——— Ryan v. French, 91 N.Y. 265 - - - - - - 622
——— Satterlee v. Board of Police, 75 N. Y. 38 - - 622
——— Teschemacher v. Davidson, 30 Cal. 379 - - - 541
——— Williamson v. McKinney, 52 N. Y. 374 - - 266-268
——— Wood v. Draper, 15 N. Y. 532 - - - - - 266
Perkins v. Watertown, 5 Biss. 320 - - - - - - 219
Perley v. Oldtown, 49 Me. 31 348
Perryman v. Wolffe, 93 Ala. 291 - - - - - - 486
Pettigrew v. Evansville, 25 W. 227 - - - - - - 297
Pewaukee v. Savoy, 103 W. 271 427, 539, 616
Phillips v. Albany, 28 W. 340 17
Pickering v. Busk, 15 East, 38 - - - - - - - 87
Pierce v. Seymour, 52 W. 272 531
——— v. Wilcox, 40 Ind. 70 - 657
Pimental v. San Francisco, 21 Cal. 351 - - - - - 595
Pinkum v. Eau Claire, 81 W. 301 - - - - - - 587
Piper v. C., M. & St. P. R. Co. 77 W. 247 - - - - - 74
Pittsburg M. Co. v. Spooner, 74 W. 307 - - - - - 361
Pixley v. Boynton, 79 Ill. 351 487
Planters' Bank v. Sharp, 6 How. 301 - - - - - 227
Plumer v. Marathon Co. 46 W. 163 - - - - - - 225
Pooler v. State, 97 W. 630 - 515
Portis v. Creagh, 4 Port. (Ala.), 332 - - - - - - 196
Powell v. Ashland I. & S. Co. 98 W. 35 - - - - - 302
Pratt v. Boody, 55 N. J. Eq. 176 487
Priewe v. Wis. State L. & I. Co. 93 W. 534 - - 427, 539
Pritzlaff H. Co. v. Berghoefer, 103 W. 359 - - - - - 503
Putnam v. Bicknell, 18 W. 333 320
——— v. Rubicon, 32 W. 498 224, 226

Putney Bros. Co. v. Milwaukee Co. 108 W. 554 - - - 353
Radl, *In re*, 86 W. 645 - - 395
Railroad Co. v. Hecht, 95 U. S. 168 - - - - - - 218
——— v. Schurmeir, 7 Wall. 272 - - - - - - 427
Raipe v. Gorrell, 105 W. 636 - 280
Ramsey Co. Sup'rs v. Heenan, 2 Minn. 330 - - - 26, 27
Randolph's Adm'x v. Kinney, 3 Rand. (Va.), 396 - - 321
Rathbone v Wirth, 150 N. Y. 459 - - - - - 265-267
Read v. Plattsmouth, 107 U. S. 568 - - - - - - 595
Reed v. Fletcher, 24 Neb. 435 661
Regan v. C., M. & St. P. R. Co. 51 W. 399 - - - - - 97
Reg. v. King, 7 Q. B. 782 - - 474
Reilly v. Franklin Ins. Co. 48 W. 449 - - - - - - 375
Relyea v. Tomahawk P. & P. Co. 102 W. 301 - 218, 224, 259
Reno's Ex'rs v. Davis, 4 Hen. & M. 288 - - - - - 196
Rettinghouse v. Ashland, 106 W. 595 - - - - - 622, 624
Reuter v. Lawe, 94 W. 300 - 588
Revell v. People, 177 Ill. 468 - 542
Rex v. Gill, 2 Barn. & Ald. 204 474
——— v. Journeymen Taylors, 8 Mod. 11 - - - - - 472
——— v. Patterson, 4 Barn. & Adol. 1 - - - - - - 205
Rhine v. Sheboygan, 82 W. 354 333
Richards v. State, 82 W. 172 - 405
Richmond v. Irons, 121 U. S. 27 152
Roberts v. Stevens, 84 Me. 325 199
——— v. Wood, 38 W. 60 - 656
Rochester v. Alfred Bank, 18 W. 432 - - - - - 13, 14
Roelke v. Roelke, 108 W. 204 - 232
Rogers v. Rogers, 4 Paige, 516 56
Rolette v. Rolette, 1 Pin. 370 51, 56
Roosevelt v. Land & River Co. 108 W. 653 - - - 642
Rosenthal v. Wehe, 58 W. 621 214, 218, 223
Rountree v. Smith, 108 U. S. 269 - - - - - - 487
Rozek v. Redzinski, 87 W. 525 320
Ruggles v. Tyson, 164 W. 500 193
Russell v. Freer, 56 N. Y. 67 - 143
Rutherford v. Green's Heirs, 2 Wheat. 196 - - 33
Ryan v. C. & N. W. R. Co. 101 W. 506 - - - - - - 258
——— v. La Crosse City R. Co. 108 W. 122 - - - 74
Sage v. Morosick, 69 Minn. 167 446
St. Clara F. Academy v. Delaware Ins. Co. 93 W. 57 - 368
St. Louis, Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51 - 363-4
Salt Lake City v. Hollister, 118 U. S. 256 - - - - 595
Sandwich Mfg. Co. v. Feary, 40 Neb. 226 - - - - 556
——— v. Trindle, 71 Iowa, 600 556
Sassenberg v. Huseman, 182 Ill. 341 - - - - - - 329
Sauers v. Giddings, 90 Mich. 50 - - - - - - 445, 446
Sauntry v. Dunlap, 12 W. 364 163
Saveland v. Green, 36 W. 612 324
Savile v. Roberts, 1 Ld. Raym. 374 - - - - - - 473
Scanlon v. Warren, 68 Ill. App. 213 - - - - - - 487
——— v. ———, 169 Ill. 142 - 487
Schillinger v. Verona, 85 W. 595 - - - - - - 576
Schlimgen v. C., M. & St. P. R. Co. 90 W. 186 - - 72, 74
Schluckebier v. Babcock, 104 W. 293 - - - - - 119
Schneider v. C., M. & St. P. R. Co. 99 W. 378 - - 74, 390
Scholfield v. U. S. 32 Fed. 576 - - - - - - 622
Schraer v. Stefan, 80 W. 654 - 578
Schumacher v. Seeger, 65 W. 394 - - - - - - 306
Schuster v. State, 80 W. 107 - 402
Scofield v. Council Bluffs, 68 Iowa, 695 - - - - 595
Scott L. Co. v. Hafner-Lothman Mfg. Co. 91 W. 672 - 202
Seagraves v. Alton, 13 Ill. 366 348
Seaman v. Burnham, 57 W. 568 - - - - - - 578
Second Nat. Bank v. Larson, 80 W. 469 - - - - - 668
Second Ward S. Bank v. Schranck, 97 W. 250 214, 215, 221
Seegar v. Ashland, 101 W. 515 226
Selsby v. Redlon, 19 W. 17 214, 217
Senour Mfg. Co. v. Clarke, 96 W. 469 - - - - - - 105
Seyk v. Millers' Nat. Ins. Co. 74 W. 67 - - - - - 375

Seymour v. Browning, 17 Ohio, 362 - - - - - - 665
——— v. Spring Forest C. Asso. 144 N. Y. 338 - 364, 365
Shadbolt & B. I. Co. v. Topliff, 85 W. 525 - - - - - 578
Shafer v. Hogue, 70 W. 392 571, 572
Shaffel v. State, 97 W. 377 - 515
Sheel v. Appleton, 49 W. 125 - 259
Sherman v. Story, 30 Cal. 253 - 26
Shores L. Co. v. Stitt, 102 W. 450 - - - - - - 481
Single v. Marathon Co. 38 W. 363 - - - - - - - 15
Slack v. N. W. Nat. Bank, 103 W. 57 - - - - - - 362
Slade v. Van Vechten, 11 Paige, 21 - - - - - - - 362
Slater v. Rawson, 1 Met. 450 - 323
——— v. ———, 6 Met. 439 - 323
Slaughter v. Bernards, 97 W. 184 - - - - - - - 675
Smith v. Allis, 52 W. 337 - 328
——— v. Armstrong, 24 W. 446 279
——— v. Barron Co. 44 W. 686 593
——— v. Colerain, 9 Met. 432 347, 349, 355
——— v. McGuire, 67 Ala. 34 329
——— v. Milwaukee B. & T. Exch. 91 W. 360 - - - 390
——— v. Nippert, 76 W. 86 - 472
Somers v. Schmidt, 24 W. 417 324
South Bend C. P. Co. v. George C. Cribb Co. 97 W. 230 - 362
Spaulding v. North Milwaukee T. S. Co. 106 W. 481 - 154
Spear v. Crawford, 14 Wend. 20 - - - - - - - - 148
Spencer's Case, 1 Smith, Lead. Cas. (9th Am. ed.), 224 - - 322
Spensley v. Janesville C. M. Co. 62 W. 549 - - - 119
Spooner v. Cummings, 151 Mass. 313 - - - - - 86
Sprague v. Warren, 26 Neb. 326 - - - - - - - 484
Stacy v. M., L. S. & W. R. Co. 85 W. 225 - - - - - 463
Stanton v. Wilson, 2 Hill, 153 148
Starkweather v. Hawes, 10 W. 125 - - - 213, 216, 224
State v. Buchanan, 5 Har. & J. 317 - - - - - - - 473
——— v. Cameron, 2 Pin. 490 513
——— v. Carpenter, 68 W. 165 568
——— v. Castle, 44 W. 670 - 616
——— v. Crowley, 41 W. 271 474
State v. Donaldson, 32 N. J. Law, 151 - - - - - 472
——— v. Douglas, 26 W. 428 - 269
——— v. Gillen, 49 W. 683 - 237
——— v. Grove, 77 W. 448 - 414
——— v. Joyce, 19 W. 90 - 616
——— v. Lewis, 69 Mo. 92 - 407
——— v. Page, 12 Neb. 386 - 17
——— v. Pauley, 12 W. 537 - 513
——— v. Peck, 53 Me. 284 - 143
——— v. Rowley, 12 Conn. 101 472
——— v. St. Croix B. Corp. 60 W. 565 - - - - - - 626
——— v. Younger, 1 Dev. Law, 357 - - - - - - 473
State *ex rel.* Att'y Gen. v. Cunningham, 81 W. 440 - - 627, 630
——— Bement v. Rice, 35 W. 178 - - - - - - - 316
——— Board of Education v. Haben, 22 W. 101 - 629, 631
——— Brown v. Stewart, 60 W. 587 - - - - - 514, 516
——— Cameron v. Roberts, 87 W. 292 - - - - - - 58
——— Cash v. Sup'rs of Juneau Co. 38 W. 554 - - 626, 629
——— Chappell v. Giles, 10 W. 101 - - - - - - 169
——— Cothren v. Lean, 9 W. 279 - - - - - - 12
——— Covenant M. B. Asso. v. Root, 83 W. 667 - - 628–630
——— Drake v. Doyle, 40 W. 175 - - - 626, 628, 629
——— Fourth Nat. Bank v. Johnson, 103 W. 591 - - 627
——— Giroux v. Lien, 108 W. 316 - - - - - - 58
——— Gray v. Common Council, 104 W. 622 - - - 57
——— Hamilton v. Krez, 88 W. 135 - - - - 266, 268
——— Hartung v. Milwaukee, 102 W. 509 - - - - 568
——— Heiden v. Ryan, 99 W. 123 - - - - - - 32
——— Heller v. Lawler, 103 W. 460 - - - - - - 58
——— Isenring v. Polacheck, 101 W. 427 - - - - 25
——— Kercheval v. Mayor of Nashville, 15 Lea, 697 - - 622
——— Lamb v. Cunningham, 83 W. 90 - - - - 630
——— Radl v. Shaughnessey, 86 W. 646 - - - - 627

State *ex rel.* Raymer v. Cunningham, 82 W. 39 - - 629
——— Soutter v. Common Council, 15 W. 30 - 213, 231
——— Wood v. Goldstucker, 40 Wis. 124 - - - - - 396
Stein v. Benedict, 83 W. 603 - 165
Stephens v. Chappell, 3 Strob. Law, 80 - - - - - 577
Stewart v. McSweeney, 14 W. 468 - - - - - - 261
Stockham v. Browning, 18 N. J. Eq. 390 - - - - - 427
Stocks v. Sheboygan, 42 W. 315 258
Stocksdale v. U. S. 39 Fed. 62 - 622
Stoddard v. Locke, 43 Vt. 574 657, 662
Stokes v. N. J. P. Co. 46 N. J. Law, 237 - - - - - 497
Stolze v. Manitowoc T. Co. 100 W. 212 - - - - - - 643
Story v. Salomon, 71 N. Y. 420 486
Straker v. Phenix Ins. Co. 101 W. 419 - - - - - - 376
Streubel v. M. & M. R. Co. 12 W. 67 - - - - - 213, 217
Stricker v. Reedsburg, 101 W. 457 - - - - - - 616
Stringham v. Cook, 75 W. 589 43
Stubbings v. McGregor, 86 W. 248 - - - - - 503, 504
Sturges v. Crowninshield, 4 Wheat. 122 - - - 218, 227
Sullivan v. Collins, 107 W. 291 312
Sun Mut. Ins. Co. v. New York, 8 N. Y. 241 - - 23
Sutton v. Fox, 55 W. 531 - 403
Sydnor v. Palmer, 32 W. 406 - 214, 217, 223
Sydserff v. Reg. 11 Q. B. 245 - 474

Tappan v. Warren F. C. S. Bank, 127 Mass. 107 - - 497
Taylor v. Paterson, 9 La. Ann. 251 - - - - - - 178
T. B. Scott L. Co. v. Hafner-Lothman Mfg. Co. 91 W. 672 292
Teipel v. Meyer, 106 W. 41 - 610
Telford v. Ashland, 100 W. 238 211
——— v. Frost, 76 W. 172 - 675
Tennessee v. Sneed, 96 U. S. 69 - - - - - - - 219
Terry v. Anderson, 95 U. S. 628 218
Thatcher v. Candee, 4 Abb. Dec. 387 - - - - - 196
Thompson v. Citizens' Ins. Co. 45 W. 388 - - - - - 375
——— v. Milwaukee, 69 W. 492 17
Tisher v. Beckwith, 30 W. 55 141
Todd v. Daniel, 16 Pet. 521 - 196
Tomlinson v. Derby, 43 Conn. 562 - - - - - - 96
Trapp v. New Birdsall Co. 99 W. 458 - - - - - - 553
Travelers' Ins. Co. v. Fricke, 94 W. 258 - - - - - 27
Trustees v. Delaware Ins. Co. 93 W. 57 - - - - - 368
Tufts v. Brace, 103 W. 341 - 279
Tupper v. Huson, 46 W. 646 - 299
Twin-Lick O. Co. v. Marbury, 91 U. S. 587 - - - - - 361
Two Rivers Mfg. Co. v. Beyer, 74 W. 210 - - - - - 664
Tyson v. Tyson, 94 W. 225 - 193

Umsted v. Buskirk, 17 Ohio St. 113 - - - - - 151, 152
U. S. v. Brighton R. Co. 25 Fed. 465 - - - - - - 542
——— v. Knox, 102 U. S. 422 - 150
——— v. Rodgers, 150 U. S. 249 517

Valley I. W. Mfg. Co. v. Goodrick, 103 W. 436 - - - 597
Vance v. Vance, 108 U. S. 514 219, 224
Vilas v. Bundy, 106 W. 168 - 554
Viles v. Bangs, 36 W. 131 - 163
Vliet v. Sherwood, 35 W. 229 569
Von Baumbach v. Bade, 9 W. 559 - - - 213-216, 224
Von Hoffman v. Quincy, 4 Wall. 553 - - - - - 212
Vorbrich v. Geuder & P. Mfg. Co. 96 W. 277 - - - 462
Vorous v. Phenix Ins. Co. 102 W. 80 - - - - - - 376

Walker v. Cronin, 107 Mass. 555 - - - - - - 476
——— v. Ebert, 29 W. 194 141, 142
——— v. Shepardson, 2 W. 384 568
Wall v. Schneider, 59 W. 352 481, 485, 489
Wallace v. McConnell, 13 Pet. 136 - - - - - - 661
Walsh v. Fisher, 102 W. 172 - 181
Walworth Co. Bank v. Farmers' L. & T. Co. 14 W. 325 - 497
Ward v. C., M. & St. P. R. Co. 102 W. 215 - - - - 484
——— v. C., St. P., M. & O. R. Co. 85 W. 601 - - 69, 71-74
Warner v. Cuckow, 90 W. 291 683
——— v. Knox, 50 W. 429 - 16

Warrick v. Hull, 102 Ill. 280 - 329
Watson v. Blaine, 12 Serg. & R. 131 - - - - - - 321
Webb v. Miller, 24 Miss. 638 - 659
Webster v. Douglas Co. 102 W. 181 - - - - - - 871
Weed & G. Mfg. Co. v. Whitcomb, 101 W. 226 - - - 258
Weetjen v. Vibbard, 5 Hun, 265 - - - - - - 196
Weir v. Mosher, 19 W. 311 - 195
Weisel v. Spence, 59 W. 301 - 43
Wellington v. Jackson, 121 Mass. 157 - - - - - 456
Wells v. Am. Exp. Co. 49 W. 224 - - - - - - 185
Wendall v. Osborne & Co. 63 Iowa, 99 - - - - - 556
Wendt v. Vogel, 87 W. 462 - 503
Wheeler v. McDermid, 36 Ill. App. 179 - - - - - 484
——— v. State, 24 W. 52 - 514
White v. C. & N. W. R. Co. 102 W. 489 - - - 73, 74, 390
Whitman v. Oxford Nat. Bank, 176 U. S. 559 - - - - 151
Whitney v. Detroit L. Co. 78 W. 240 - - - - - 339, 340
Wilder v. Weatherhead, 32 Vt. 765 - - - - - - 661
Wile v. Southbury, 43 Conn. 53 - - - - - - - 347
Wilkins v. Nicolai, 99 W. 178 297, 298
Willard v. Comstock, 56 W. 565 - - - - - - 371
Wille v. Bartz, 88 W. 424 - 245
Williams v. People, 24 N. Y. 405 - - - - - - 21
——— v. Williams, 102 W. 246 185
Williamson v. Neeves, 94 W. 656 - - - - - - 245
Willow River Club v. Wade, 100 W. 86 - - - 427, 567
Wills v. Ashland L., P. & St. R. Co. 108 W. 255 - - 74
Wilson v. Eau Claire, 89 W. 47 576
——— v. Henry, 40 W. 594 428, 617
Winchester W. W. & M. Co. v. Carman, 109 Ind. 31 - 87, 90
Wing v. Thompson, 78 W. 256 89, 93
Winkler v. Racine W. & C. Co. 99 W. 184 - - - 181
Wisconsin I. School v. Clark Co. 103 W. 651 - - - 334
Wisconsin K. I. Co. v. Milwaukee Co. 95 W. 158 - - 333
Wood v. Blythe, 42 W. 300 - 118
——— v. Treleven, 74 W. 577 503
Woodbury v. Robbins, 10 Cush. 520 - - - - - 577
Woodward v. Hill, 6 W. 148 - 184
——— v. Smith, 104 W. 365 - 609
Worth v. Newton, 10 Exch. 247 - - - - - - 205
Worthley v. Burbanks, 146 Ind. 534 - - - - - - 446
Wright v. Sperry, 21 W. 331 - 321
Wyman v. State, 13 W. 663 - 616
Wyss v. Grunert, 108 W. 38 - 159

Yates v. Milwaukee, 10 Wall. 497 - - - - - - 427
——— v. Shepardson, 39 W. 173 - - - - - - 164
Yearnshaw's Appeal, 25 W. 21 132
Yellow River I. Co. v. Arnold, 46 W. 214 - - - 15–17

Zalesky v. Iowa State Ins. Co. 102 Iowa, 512 - - - 676
Zimmerman v. Gerdes, 106 W. 608 - - - - - - 643
Zinc C. Co. v. First Nat. Bank, 103 Wis. 125 45, 165, 371, 597
Zitske v. Goldberg, 38 W. 217 14–17
Zoesch v. Thielman, 105 W. 117 - - - - - - 159

CASES DETERMINED

AT THE

January Term, 1901.

LIEBERMANN, Respondent, vs. LIPPERT, Appellant.

January 8 — February 1, 1901.

Sales: Breach of warranty: Evidence: Shortage in weight: Burden of proof.

1. Where defendant was liable to his vendee for the cost of new bags and the rebagging of peas in a warehouse, evidence showing merely the total amount of the warehouse charges, including storage for which defendant was not liable, did not establish the amount of his liability.
2. Testimony of the vendee that one to whom he had sold the peas made a demand of him for such charges specifically, being objected to, was evidence only of the fact of the demand, and did not tend to prove that the expenses specified had been incurred.
3. The burden of showing a shortage in the guaranteed weight of peas sold while stored in a warehouse was upon the vendee and was not shifted by evidence that three months after the sale there was a shortage, where it appeared that in the interval the peas had been handled over and rebagged, giving abundant opportunity for change in their condition and amount.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

On June 22, 1897, the plaintiff and defendant were both merchants at Milwaukee. On that day the defendant sold to the plaintiff certain Scotch peas, then in storage ware-

house at Baltimore, by bill of sale or invoice, the material terms of which were as follows:

Rosenberg & Liebermann,

Bought of *Henry H. Lippert.*

200 boxes Scotch peas, 36,199 lb., 603 1/8 bu., at 51c	$307 69
Freight prepaid	70 40
At Baltimore	$378 09

Weights guaranteed, bags good condition, and subject to no other charge.

Paid. *H. H. Lippert,* June 22, 1897.

The plaintiff sold the same peas to another person while still in storage and without having been seen either by him or his customer. When withdrawn from the storage warehouse, October 14, 1897, the peas were weighed and amounted to only 33,514 pounds, and there were charges against them of $54.85, of which $20 was for storage up to June 22d; the balance for charges subsequent to that date, for storage, cost of new bags, and labor in cleaning and rebagging. It appeared that on June 22d the peas were apparently in good condition, the bags more or less eaten by rats. The contract price of the shortage in weight of the peas was $26.25.

The court directed a verdict for the plaintiff for $72.87, made up of the following items: Value of shortage in weight, $26.62; storage charges, June 22, 1897, $20; new bags, $16.25; labor rebagging, $10,— upon which judgment for the plaintiff was entered, and from which the defendant appeals.

For the appellant the cause was submitted on the brief of *McElroy & Eschweiler.* They argued, among other things, that proof of the weight of the peas in June might be proper and competent evidence to establish the presumption that their weight in the following October was the same, although such presumptions are not absolute. *Crotty v. Union M. L. Ins. Co.* 144 U. S. 621. The contrary, however, is never true, for such presumptions never run backward. Lawson, Presumptive Ev. Rule 37, p. 238; Bradner, Ev. (1st ed.),

440–442; *Jarvis v. Vanderford*, 116 N. C. 147; *Martyn v. Curtis*, 67 Vt. 263; *Erskine v. Davis*, 25 Ill. 251; *Murdock v. State*, 68 Ala. 567; *Windhaus v. Bootz*, 92 Cal. 617; *Barelli v. Lytle*, 4 La. Ann. 557; *Taylor v. Cresswell*, 45 Md. 422.

William Kaumheimer, for the respondent, contended, *inter alia*, that it having been established that the peas were "in store" at Baltimore, and that the only time they were weighed there they weighed only 33,650 pounds, the burden of proof rested on defendant to show that they had ever weighed more, or that any change had occurred to reduce the weight in the interim from June to October. *Laughlin v. C. & N. W. R. Co.* 28 Wis. 204; *Gibbon v. Hughes*, 76 Wis. 409.

DODGE, J. Upon careful examination of the record, we are unable to find any evidence to justify instruction of verdict in favor of plaintiff in excess of the conceded item of $20 for storage charges due at the time of the sale. As to the cost of rebagging the peas and new bags, there is no direct evidence save that of one of the warehouse employees that the total charges subsequent to the sale were $34.85 for bags and rebagging *and for storage*, but the amount for each is not specified. Defendant could not be liable for subsequent storage; hence it results that the amount of his liability within that $34.85 was left indefinite and conjectural. True, plaintiff testified that Courteen, to whom he sold, made demand of him for such charges specifically. That testimony, being objected to, was evidence only of the fact of the demand. It was wholly hearsay as to the incurring by Courteen or by the warehouseman of the expenses specified, or any expenses, and did not tend to prove such facts.

As to the shortage in weight of peas, the burden of proof is, of course, on the plaintiff. That burden is not lifted by proof that three months later the peas weighed a certain

amount, when, as here, it appears that the bags in which they were kept were rat-eaten and dilapidated, and that in the interval the peas had been removed from the bags, handled over, and placed in other bags, thus showing abundant opportunity for change in the actual condition and amount after the purchase and before the weighing.

By the Court.—Judgment reversed, and cause remanded for a new trial, with the option to the plaintiff, within twenty days after notice of filing *remittitur*, to take judgment for the sum of $20.

CHAMBERLAIN, Respondent, vs. THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, Appellant.

January 8 — February 1, 1901.

Life insurance: Contracts: Independent oral agreement: Consideration: Evidence: Transaction with person since deceased.

1. A written application for insurance, signed by the insured, and a receipt for the first premium given at the same time by the agent of the insurer, each containing a provision that the company incurs no obligation by reason of any payment of premium unless the application is accepted and a policy granted and delivered, constitute a written contract between the parties, binding upon the applicant and those claiming under him, in the absence of fraud, and their effect cannot be varied by evidence that the agent said that the insurance would go into effect at once; nor can such oral agreement be sustained as an independent contract, in addition to that contained in the writings, there being no consideration to support it. *Mathers v. Union M. A. Asso.* 78 Wis. 588, so far as it holds to the contrary, overruled.
2. A life insurance company does not sustain its liability on a policy from, through, or under the insured; and the plaintiff, in an action on the policy, is therefore not precluded by sec. 4069, Stats. 1898, from testifying to transactions between the insured and an agent of the defendant.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

This is an action on an alleged oral contract of life insurance. The plaintiff is the widow of one Henry C. Chamberlain, who was accidentally killed in a railway accident on the 2d of May, 1899, and the defendant is a foreign life insurance company. The evidence of the plaintiff showed that on the 25th of April, 1899, one W. J. Cameron, an agent of the defendant, called on the deceased at his home in Milwaukee, and solicited life insurance; that as a result of the conversation between Cameron and Chamberlain, most of which conversation was in the plaintiff's presence, Chamberlain consented to take $500 insurance on his life, at a premium of thirty-five cents per week; that the agent thereupon produced a printed blank application, with numerous questions as to the health of the deceased, which he (the agent) filled out according to the answers of Chamberlain, whereupon Chamberlain signed the same and handed it back to the agent without reading it, and paid the agent thirty-five cents; that this application contained the following clause: "I further agree that no obligation shall exist against said company on account of this application, although I may have paid premiums thereon, unless said company shall issue a policy in pursuance thereof, and the same is delivered to me." The agent then tore off a printed receipt from the foot of the application, signed it, and handed it to Chamberlain; and Chamberlain took it, without reading, and handed it to the plaintiff, who kept it. This receipt was in words and figures as follows:

The Prudential Insurance Company of America.

Home Office, 761–769 Broad Street, Newark, N. J.

No. ——. April 25, 1899.

Received from H. C. Chamberlain 35 cents, which is a payment on account of application this day made for insurance in the above-named company. No obligation is incurred by said company by reason of this payment unless said application is accepted and a policy is granted and delivered.

Upon the back of the receipt appeared the following:

"Unless you receive your policy or your money is returned within three weeks from the date of this receipt, please notify the company, giving name of agent, amount paid, and the date when paid."

The plaintiff testified that during the conversation the agent said that the insurance was a paid-up policy, and in eight years he would get back $350, or in case of death $500, that, "if my husband was killed that night, the next day I would get $500; that the insurance commenced the time we paid thirty-five cents premium;" that the agent repeated two or three times, "that, if my husband was killed that night, the next day I would get $500."

In the evening of the same day a physician called upon Chamberlain with the application, and made a physical examination, and asked some questions as to Chamberlain's health, and filled in the answers given upon the physician's blank, which was signed by the physician and Chamberlain. The application was forwarded by the agent to the company, but no policy was ever issued, because the company was dissatisfied with one of the physician's answers.

About a week after Chamberlain's death some person, representing himself to be *Mrs. Chamberlain's* agent, called on the defendant's agent in Milwaukee with the receipt, and asked that the insurance be paid. Payment was refused, but the defendant's agent tendered to the person the thirty-five cents premium, which, however, he refused to take. The plaintiff denied authorizing any one to make this demand. On May 18, 1899, the plaintiff's attorneys gave notice by mail of Chamberlain's death, and requested blanks for the making of proofs, but the defendant company denied liability because the application never had been acted upon and no policy had been issued. This action was thereupon brought.

The defendant paid the thirty-five cents into court, and after the hearing of the testimony the trial court directed a

verdict for the plaintiff for $500 and interest, and the defendant appeals.

For the appellant there was a brief by *McElroy & Eschweiler*, attorneys, and *Van Dyke & Van Dyke & Carter*, of counsel, and oral argument by *W. D. Van Dyke.*

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles.*

WINSLOW, J. While this was in form an action to establish and enforce an oral contract of life insurance, it was in fact an attempt to alter the terms of a written contract by parol evidence. That the application of Chamberlain, and the receipt given by the agent of the defendant, constituted a written contract which was certain in its terms, cannot be doubted. This contract, in substance, was that, if the company accepted the application and issued a policy thereon, Chamberlain was to be insured in the sum of $500 thereby, and the thirty-five cents would constitute the first week's premium; but, if the application was not accepted, then the company incurred no obligation. There was no fraud claimed or proven. The most that was claimed was that Chamberlain did not read either the application or the receipt, and that the agent said that the insurance would go into effect at once. But parties cannot thus escape the effect of written contracts. Chamberlain could read, and he was clearly guilty of negligence in not ascertaining what agreements the written papers contained, and neither he nor those claiming under him can escape the effects of that negligence. The written contract is binding and must control. If, under the circumstances disclosed here, written contracts could be set aside, they would be of little value. *Dowagiac Mfg. Co. v. Schroeder*, 108 Wis. 109. Nor is there room to say that the evidence tended to prove an oral contract of present insurance in consideration of thirty-five cents paid, in addition to the application for a written policy of insurance. There

was but one amount of thirty-five cents paid, and that, as the receipt states, was paid on account of the application for the written policy of insurance. Being so paid and applied by the parties, it manifestly could not serve as a consideration for the separate oral contract; so the oral contract, even if made, would be without consideration to support it.

The case of *Mathers v. Union M. A. Asso.* 78 Wis. 588, was relied on by respondent as supporting the recovery in this case, and it seems probable that the direction of the verdict in this case was based upon that decision. The facts in that case were somewhat different from those now before us, yet it must, in fairness, be admitted that some things said in the opinion tend to justify the ruling of the trial court in this case. Careful consideration, however, brings us to the conclusion that, so far as the decision in that case conflicts with the conclusions now reached, it must be considered as overruled.

The plaintiff was allowed to testify, against objection and exception, to the conversation between her husband and the agent of the defendant, and this ruling is now assigned as error. The objection made was that the testimony was inadmissible under sec. 4069, Stats. 1898, which excludes testimony of a party as to transactions personally had with a deceased person when the opposite party "sustains his liability" from, through, or under such deceased person. The question is, Does the insurance company, in any sense, sustain its liability "from, through, or under" Chamberlain? We do not see how the question can be answered in the affirmative. It is true that the insurance company was dealing with Chamberlain in the transaction, but it was the opposite party in the deal. It sustained its liability, if any, through its contract with Chamberlain, but in no reasonable meaning of words through or under Chamberlain. We perceive no error in the ruling.

By the Court.— Judgment reversed, and action remanded for a new trial.

MILWAUKEE COUNTY, Respondent, vs. ISENRING and others, Appellants.

January 8—February 1, 1901.

109	9
112	[2]607
109	9
114	48
114	50
109	9
116	[1] 89
116	[3]198
61 LRA	671
109	9
117	[4]654

Constitutional law: Statutes: General and local acts: Evidence as to passage and contents of bills: Legislative journals: Uniformity in county government: Sheriffs: Salaries.

1. A law is "general" in the broad sense of the term if it extends to the whole state or the whole of a legislative class of localities legitimately created for the purposes of general legislation.
2. A law is "general" in the restricted sense of the term, as it is used in sec. 21, art. VII, Const., not only when it is general in the broad sense thereof, but also when it is of that character in the sense of being public. But if it applies only to a single subdivision of the state, as a county, town, city, or village, or a collection of such localities not constituting a legitimate class thereof for the purposes of legislation, it is local in character. Where a law is public and general in the sense indicated the two terms are synonymous.
3. If a law be general merely because it is public and not in the broad sense above indicated, it is local and special, and must be tested as to its validity by sec. 18, art. IV, Const., and sec. 21, art. VII, as well; and if it belong to one of the prohibited classes of special legislation, it must be further tested by the constitutional restriction on that subject.
4. The journals of the two houses of the legislature may be referred to by courts as to the steps taken by the legislature in the passage of bills, and they are generally conclusive in that regard. They are not thus effective as to the contents of a law when such contents are called in question. In such a case the presumption is that the contents of a law, as found in the official publication thereof, are the same as when it passed the legislature, and that it was constitutionally passed. If it be challenged upon either ground, the question presented is one of law to be solved by the court in the same way that other legal questions are solved. In reaching a conclusion the court may examine the journals of the legislature as to what it did in the passage of the law; and as to the contents thereof it may go further and examine the original bill, or go to any other source of information that may be judicially considered trustworthy.
5. Whether an act specially designed to make the offices of sheriff, undersheriff, and deputy sheriff in a single county salaried offices

violates sec. 23, art. IV, Const., in regard to there being but one system of county government affecting the whole state, and that such system shall be as uniform as practicable, doubted, but the point is not decided.

[Syllabus by MARSHALL, J.]

APPEAL from an order of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

The appeal is from an order overruling a demurrer to the complaint in an action against the sheriff of Milwaukee county and his bondsmen to recover the fees and charges collected by him and his deputies for official services. The allegations contained in the complaint are sufficient to constitute a cause of action if the plaintiff is entitled to the fees and emoluments of the sheriff's office which ordinarily go to the sheriff and his deputies. That turns on the validity of ch. 364, Laws of 1876, as amended by ch. 227, Laws of 1877. The first of such chapters, during its passage through the legislature, was entitled the same as it now appears in the printed laws, viz.: "An act in relation to sheriff's fees." It deals only with the manner of compensating the sheriff of Milwaukee county, providing that he shall receive a salary of $5,000 per annum, payable quarterly out of the county treasury, in lieu of the fees, costs, and charges ordinarily belonging to sheriffs by law, and that he shall charge and collect such fees, costs, and charges and pay the proceeds into the county treasury. The act of 1877 amended and revised that of 1876. It was entitled, during its passage through the legislature, the same as the published law, viz.: "An act to amend chapter 364 of the Laws of 1876, entitled 'An act in relation to sheriff's fees.'" The first section, in addition to the provisions of the original act, provides that the undersheriff and all deputy sheriffs of Milwaukee county shall collect for all official services performed by them and pay the proceeds thereof into the county treasury, requires of the sheriff quarterly reports

under oath as to all such collections, and allows him and such deputies traveling expenses when in discharge of official duties outside the corporate limits of the city of Milwaukee, the same to be paid on itemized bills audited by the board of supervisors. The second section provides for the appointment of an undersheriff at a salary of $1,400 per year, and nine deputy sheriffs, each to have a salary of $800 per year, except one to act as sheriff's clerk and have $1,200 per year, all such salaries to be paid out of the county treasury the same as the salaries of ordinary county officers. The balance of the act, in addition to the usual concluding section, relates to auditing the accounts of the sheriff and his deputies from the 1st day of January preceding the passage of the act, so as to make it relate back to that date. The validity of such laws was challenged by the demurrer.

For the appellants there was a brief by *Edgar L. Wood* and *Quarles, Spence & Quarles*, and oral argument by *Mr. Wood* and *Mr. T. W. Spence.*

A. C. Umbreit, counsel, for the respondent.

MARSHALL, J. Appellants' counsel insist that the act of 1876, that of 1877, and ch. 137, Laws of 1878, amending the act of 1877, are local in character, within the meaning of sec. 18, art. IV, of the constitution, which provides that, "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title," and cite to our attention numerous decisions of this court to sustain that view. Counsel for respondent just as confidently contend that such acts are not local within the meaning of such constitutional provision, and cite to our attention numerous decisions of this court to sustain that view. Clearly, both contentions cannot be correct, though it must be admitted that each has support in our decided cases. The cause of that confusion will appear by a review of such cases, and the right of the matter will be made too plain for reasonable controversy.

The difficulty commenced in *State ex rel. Cothren v. Lean*, 9 Wis. 279, which involved the question of whether an act changing a county seat was a general law within the meaning of sec. 21, art. VII, of the constitution, which provides that, "the legislature shall provide by law for the speedy publication of all statute laws, and of such judicial decisions made within the state as may be deemed expedient. And no general law shall be in force until published." It was then contended on one side that the word "general" relates to the state at large, and on the other that it has reference to the mere public character of an act in that its effect is general as regards the people of the locality referred to therein, whether that locality include the entire state or some subdivision thereof, as a county, town, city, or village, or some collection of such subdivisions. The latter idea prevailed, Justice COLE dissenting, using language to the effect that an act cannot be public and general and at the same time local. The view thus expressed by Mr. Justice COLE has never considerately and permanently found lodgment in the jurisprudence of this state and displaced the reasoning of Mr. Justice PAINE, who delivered the opinion of the court; though it has so influenced judicial action, at times, that the court temporarily stepped aside from the position firmly taken at the start. In *Clark v. Janesville*, 10 Wis. 136, which involved the character of the law incorporating the city of Janesville, as regards sec. 21, art. VII, of the constitution, Justice PAINE, speaking for the court, rediscussed the subject of the meaning of the word "general," as used in statutes and constitutions, at great length and with much learning, demonstrating by reference to authorities, from Coke down to the time of writing the opinion, that the term "public," in its legal sense, and the term "general" in that sense, as used in statutes and constitutions, are synonymous, and that the fact that an act is local or special does not necessarily militate against its being public and general. The

court so decided, Justice COLE, however, dissenting upon the same ground as before, with increased firmness, and giving additional reasons to support his view. That case was soon followed by several others involving the same question, in which it was affirmed without dissent. *Rochester v. Alfred Bank*, 13 Wis. 432; *Berliner v. Waterloo*, 14 Wis. 378; and *Mills v. Jefferson*, 20 Wis. 54, are among such cases. In each of such cases the law involved was challenged under sec. 21, art. VII, yet the reasoning and decision in each are to the effect that an act may be local and yet be general. That naturally led to the decision in *Durkee v. Janesville*, 26 Wis. 697, opinion by Mr. Justice COLE, where an act amending the charter of the city of Janesville, a law of the same character as those held in the previous cases to be general, was decided to be local within the meaning of sec. 18, art. IV, and so clearly of that character as not to admit of a reasonable controversy about it.

In *Castello v. Landwehr*, 28 Wis. 522, in dealing with the question of whether a law authorizing a town to purchase a bridge was a general law as regards rules of pleading, the decision was in the affirmative, referring, for support, to those cases where the word "general," as used in the constitution, had been considered. The effect was in line with the reasoning of Mr. Justice PAINE in *Clark v. Janesville*, that "general" and "public," as used in statutes and constitutions, are ordinarily synonymous; that both relate to the effect of a law upon the persons who come within its scope and not to its scope as regards territory. *Mills v. Charleton*, 29 Wis. 400, followed next in order. The law there questioned related to the reassessment of taxes in the city of Madison. In harmony with *Durkee v. Janesville* and the other cases referred to, it was said to be local, and its sufficiency was tested by sec. 18, art. IV, of the constitution. In *Evans v. Sharp*, 29 Wis. 564, a law for the reassessment of certain taxes in the city of Oshkosh was held to be local.

The next case of significance is *Lawson v. M. & N. R. Co.* 30 Wis. 597. The law there called in question affected a large portion of the state. It authorized certain towns, counties, and cities to aid in the construction of a railroad. That it was a general law within the meaning of the constitutional provision requiring such laws to be published was not questioned. It was challenged under the constitutional restriction upon legislative power, as regards the title to local laws. Justice COLE wrote the opinion of the court. The title was held sufficient, but it was said, *arguendo*, that the act was not, strictly speaking, local or private within the meaning of the constitution, citing *Clark v. Janesville, supra; Rochester v. Alfred Bank, supra; Berliner v. Waterloo, supra;* and *Mills v. Jefferson, supra.* That observation was in harmony with the dissenting opinions to which we have referred, but out of harmony with the decisions of the court down to that time.

The next case of importance is *Zitske v. Goldberg*, 38 Wis. 217, 232. The opinion on rehearing was written by Mr. Justice COLE. In harmony with his previously expressed views on the subject, except in *Durkee v. Janesville*, 26 Wis. 697, to which we have adverted, he said, as regards the matter under consideration,— an act incorporating a village,— that it was not a private or local act, but a public or general law. In that, for the first time, the court adopted, seemingly, the idea that an act cannot be public and general and at the same time local. The conflict thus created was evidently not observed by the court at the time the decision was made. The indications that way are unmistakable, so we are warranted in saying that there was no intention of overruling the previous decisions on the subject. The cases cited in the opinion, except one, relate to questions under sec. 21, art. VII, of the constitution. It was overlooked that they are to the effect that the test of that provision may still require the further test as regards sec. 18, art. IV. *Durkee*

v. Janesville was not in mind. If those considerations leave any doubt that the decision was not intended to establish a new doctrine, it is displaced by the fact that, at the same term, in *Single v. Marathon Co.* 38 Wis. 363, opinion by Mr. Justice LYON, who wrote the first opinion in *Zitske v. Goldberg*, where the constitutional question was not discussed, but appears to have concurred in the second opinion by Mr. Justice COLE, a law similar to the one said in that case not to be local because it was general, was said to be local in character and was tested by the constitutional provision on that subject, citing *Mills v. Charleton*, 29 Wis. 400, and *Evans v. Sharp*, 29 Wis. 564.

The subject does not appear to have received consideration in the court again until *Yellow River I. Co. v. Arnold*, 46 Wis. 214, was reached. There the opinion was written by Mr. Justice TAYLOR, who endeavored to bring all the cases theretofore decided by this court into harmony, and demonstrate that those holding that a law relating to a subdivision or collection of subdivisions of the state is "general" within the meaning of the constitutional provision relating to the requirement that general laws must be published before going into operation, were in harmony with those holding that such a law is local and must, in order to be valid, satisfy both sec. 18, art. IV, and sec. 21, art. VII, of the constitution. It is to be regretted that in the thorough study which the court then endeavored to give to the subject, and the collection of cases theretofore decided, which was intended to be complete so as to firmly establish the principle announced, *Zitske v. Goldberg*, 38 Wis. 217, was overlooked. The purpose indicated, however, is unmistakable, because the only other case in which the error had found a place in the opinions of the court (*Lawson v. M. & N. R. Co.* 30 Wis. 597) was cited as an instance of where a law, obviously general within the meaning of sec. 21, art. VII, of the constitution, was held to be local, and the fol-

lowing general statement was made of the law as laid down in our decided cases: "In the case of *Castello v. Landwehr*, 28 Wis. 522, it was held that a law authorizing the town of Wrightstown to purchase a bridge and issue bonds therefor and levy taxes to pay the same was a general law within the decisions first above cited; yet clearly, within the decision in *Durkee v. Janesville*, 26 Wis. 697, it was also a local law; and the same must be the case in respect to special laws authorizing a particular town or city to issue bonds to aid in the construction of railroads or other public improvements, and to levy taxes for that purpose. *Such laws are both general and local within the meaning of the constitution. The fact that a law is a general law undoubtedly negatives the idea that it is a private law*, but does not necessarily negative the idea that it is a local law within the meaning of the constitution."

The cases subsequent to the *Yellow River I. Co. Case*, so far as we can discover, down to those reported in volume 56 of the Reports, follow the doctrine there established. *Warner v. Knox*, 50 Wis. 429; *Harrison v. Milwaukee Co.* 51 Wis. 645. In neither of those cases is the *Zitske Case* referred to, but the *Yellow River I. Co. Case*, and others in harmony therewith, are cited and followed. Both opinions were written by Mr. Justice TAYLOR.

When the court reached *Cathcart v. Comstock*, 56 Wis. 590, opinion by the present chief justice, where the constitutionality of an act entitled "An act for the division of the county of Marathon and the erection of the county of Lincoln" was challenged as imperfect in its title, the idea that an act cannot at the same time be local and general again obtained a foothold. The title to the act was evidently sufficient, tested by the decisions on that subject. Such might well have been, and probably was, the view of the court, but unfortunately the reason given in the opinion for sustaining the act was that it was not a local law, citing *Zitske v. Goldberg*, 38

Wis. 217, and *Phillips v. Albany*, 28 Wis. 340. The latter case does not relate to the subject, it being merely a decision that the law under consideration was a general law under the constitutional provision on that subject. The numerous cases to which we have referred, holding that such a law as the one considered is local in character, seem to have been overlooked. This language was used: "True, the act operated in a single county, but it affected the rights of all the people therein; besides, it was of public concern, and can in no sense be deemed a private or local law, within the meaning of that section." That decision was followed by the decision in *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614, filed at the same time. The only authority cited was the companion case, and *State v. Page*, 12 Neb. 386. An examination of the latter case shows that it dealt with a law which was unquestionably local in character, and the title was held sufficient. That indicates that it was in the mind of the court, in deciding the two cases, as we have heretofore suggested, that the title was sufficient to satisfy the constitutional provision with reference to local laws. The error thus committed was repeated in *Thompson v. Milwaukee*, 69 Wis. 492. An act amending the city charter of Milwaukee was there held not local, because it was general, referring to *Cathcart v. Comstock* and *Zitske v. Goldberg*.

Coming down to *Anderton v. Milwaukee*, 82 Wis. 279, opinion by the present chief justice, an act specially relating to the city of Milwaukee and amendatory of its charter,— a law of the same character as that considered in *Thompson v. Milwaukee, supra*,— was held to be local, and void for non-compliance with the constitutional requirements as to title, only cases in harmony with that view being cited,— *Durkee v. Janesville*, 26 Wis. 697, and *Yellow River I. Co. v. Arnold*, 46 Wis. 214. The three previous cases were in effect overruled and the early doctrine re-established, and so it stands to-day.

We have now referred to nearly all of the decisions of this court touching the subject under consideration. Those omitted, it is believed, are of little or no importance. It is believed that the *Anderton Case* contains the last expression of the court where the subject was presented for decision and decided. That is in harmony with the reasoning in *Clark v. Janesville*, 10 Wis. 136, decided in 1859, and with all the decisions that followed except the few lapses adverted to, grounded on the error that a law cannot be general and public and at the same time local. We find but one subsequent case that is liable to again revive the error. That is *Lawton v. Waite*, 103 Wis. 244, 257. The validity of an act was there challenged generally. No reason was assigned. The court did not feel bound to search for reasons for invalidating the act. In the opinion it was said that there was no room for even a suspicion as to what was in the mind of counsel other than that, possibly, the act was deficient in its title. It was general in the broad sense of the term. Its effect extended to the entire state. This language was used as regards the general assignment of error: "No direct prohibition is pointed out, and we know of none, unless, indeed, appellants' counsel have in mind sec. 18, art. IV, of the constitution, which, however, is confined by its terms to private and local bills. The very existence of that express requirement . . . implies the absence of any similar restriction upon public and general acts." The previous decisions of the court to the contrary were clearly not in mind. They were not intended to be overruled or discredited.

It is believed that the lengthy history above given, of the holdings of this court on the question now presented anew for decision, is necessary in order to bring all the cases together and show clearly the doctrine at first established, the departure therefrom, from time to time, and the quick returns to the right line now occupied by the court, without

indications of any considerate purpose having existed to abandon it. In that it is hoped that we have demonstrated not only what ought to be the law, but what is the law as understood here, and so intrenched it that knowledge thereof will be present in the minds of the profession and the courts whenever an occasion may arise for applying it.

What has been said, without more, might indicate that every legislative act that in any case does not extend to the whole state, must be tested by sec. 18, art. IV, of the constitution. We do not intend to hold but that there may be a constitutional classification of localities, and legislation affecting the entire class, that will not be affected by that restriction any more than legislation for a constitutional class of cities is affected by the inhibition of special legislation. The conclusions reached may be stated, in short, as follows: An act is "general," as contradistinguished from and inconsistent with "local," in the sense the latter term is used in sec. 18, art. IV, of the constitution, only when its operation extends to the whole state, or perhaps to the whole of some class of localities therein which the legislature may constitutionally make upon the principles recognized and approved for the classification of cities for the purpose of general legislation. Mr. Binney, in his work on Restrictions upon Local and Special Legislation (p. 26), sums up an exhaustive and able review of the authorities that way. An act is "general," in the restricted sense in which the term is used in sec. 21, art. VII, of the constitution, when of that character within the broad meaning of the term; also when it is "public" in that its effects extend to the people of a locality such as a county, city, town, or village, or a collection of such localities not forming a legislative class formed for some legitimate cause, the term "general" and the term "public" being considered in this respect synonymous. When an act is general merely because it is public, it is at the same time local and must be tested as to its validity by

sec. 21, art. VII, and sec. 18, art. IV, as well; and if it belong to one of the prohibited classes of special legislation, as it well may, it must also be tested by the constitutional restriction upon that subject.

The foregoing conclusions need no support outside the decisions of this court. They are the law, too firmly established to be reasonably questioned. However, a reference to authorities elsewhere, judicial and elementary, will show that all are in substantial harmony. See Endlich, Interp. Stats. § 502, and cases cited; *Gaskin v. Meek*, 42 N. Y. 186. The following are examples of laws held in other states to be local under constitutional restrictions similar to ours: An act to amend the charter of a city (*Morford v. Unger*, 8 Iowa, 82); an act to extend the corporate powers of a town (*Neifing v. Pontiac*, 56 Ill. 172); an act to change the boundaries of two counties (*Humboldt Co. v. Churchill Co. Comm'rs*, 6 Nev. 30); an act for the enlarging of a county (*Blood v. Mercelliott*, 53 Pa. St. 391); an act for the formation of a new county (*Brandon v. State*, 16 Ind. 197); an act locating a county seat (*Cutlip v. Sheriff of Calhoun Co.* 3 W. Va. 588); an act relating to the county of New York (*People ex rel. Davies v. Comm'rs of Taxes*, 47 N. Y. 501). In Sedgwick, Stat. & Const. Law, 529, note, the writer summed up a review of the authorities thus: "It is settled that if the statute be either local or private, the requirement as to title applies; that is, if the act be local as to territory, no matter how public it may be in its character, it can contain but one subject, and that must be expressed in the title." To that the following examples of local laws are given, each of which will be recognized as a general law: A statute relating to a single city or county (*People ex rel. McConvill v. Hills*, 35 N. Y. 449); an act relating to the raising of money in the county of New York, for the use of the corporation of the city of New York (*People v. O'Brien*, 38 N. Y. 193); an act to improve the public health of the city

of New York (*In re Paul*, 94 N. Y. 497); an act in relation to the fees of the sheriff of the city and county of New York (*Gaskin v. Meek*, 42 N. Y. 186). As indicated by the title, the act considered in the last case cited is of the same character as those here in question, as regards the subject under discussion. *Williams v. People*, 24 N. Y. 405, and some other cases, so far as holding that an act relating to the fees of the officers of a county is not local, were in effect overruled. Such cases were considered in *People v. O'Brien*, *supra*, where it was said, in substance, that they were not sustainable except upon the ground that the acts considered contained peculiar provisions extending their operation throughout the state. The following language was used as to the constitutional purpose in respect to titles to local acts: "The framers of the constitution must be presumed to have used the term 'local' in the sense in which it is generally understood. In this sense, any law limited to any particular locality is local, irrespective of the population of such locality, whether great or small."

It follows from what has been said that the law under consideration must be considered as local and be tested by the constitutional restriction applicable thereto. At this point we are favored with a concession by respondent's counsel, that neither the title to the act of 1876, nor that of 1877, clearly expressed the object of the law it covers. He might well have gone further and admitted that neither title indicates the primary object of the law at all. The object of the first act was to compensate the sheriff of Milwaukee county for his services by a salary paid out of the county treasury in lieu of fees. The subject of fees was matter of detail. There was nothing in the act indicating, even remotely, that its primary purpose was to deal exclusively with the subject of sheriff's fees collected by the sheriff of Milwaukee county. The title to the second act is still worse, for the body of it indicates two primary pur-

poses, one to compensate the sheriff of Milwaukee county by a salary in lieu of fees, and one to create several additional salaried county offices. Here, as before, all said about the collection and disposition of the fees is mere matter of detail. The title, at best, suggests only the details, leaving the primary object or objects entirely out of view. It is useless to endeavor to sustain such legislation by the familiar principle that the constitutional provision as to local legislation only requires that the title to a local bill, when liberally construed, shall suggest the subject thereof, and that such subject shall be single. Here the subject of the act is not suggested by the title at all. A studied attempt to evade the wise constitutional restriction is not indicated, but rather an utter failure to take any notice of it.

No doubt the constitutional provision "should be liberally construed by the courts so that its beneficial purposes will be secured without embarrassing legislation." True, any number of provisions relating to a single object, including all the necessary or reasonable details thereof, may be covered by a title in such general terms as to fairly indicate such object; but, as has been aptly said, 'the unity of the object must be sought in the end which the legislature purposes to accomplish, and not in the details provided to reach that end.' It is also true that the particularity to be observed in framing the title to a bill, within all reasonable bounds, is a matter of legislative discretion. *Evans v. Sharp*, 29 Wis. 564. But how do the laws in question stand by that test? The primary object indicated by the titles is *sheriff's fees*, generally, throughout the state of Wisconsin. The primary object covered by such titles is to take the sheriff's office of Milwaukee county out from under the general laws of the state, and make it, and all positions under and connected with it, salaried offices.

The idea, as regards this branch of the case, that it must be remembered that we are dealing with a mere technical-

ity, cannot be indorsed. We are dealing with an important constitutional restriction upon legislative power. Courts that refer to such an objection to a law as the one here presented as technical, misconceive the situation. The framers of the constitution, in adopting sec. 18, art. IV, intended to guard against the danger of legislation, affecting private or local interests, being smuggled through the legislature under misleading titles, by requiring every bill affecting such interests to be under a title likely to call attention of the lawmakers to its character, and likewise the attention of the people affected, to the end that every member of the legislature may intelligently participate in considering such bill and all objections thereto may be presented. This court very early recognized the importance of that limitation upon legislative power, and said that the evident purpose of the framers of the constitution was that it should be given full force and effect, and that there is no justification for treating it as merely directory or sanctioning evasions of it in any way. *Durkee v. Janesville*, 26 Wis. 697. Attention was there called, approvingly, to the views of the New York court expressed in *Sun Mut. Ins. Co. v. New York*, 8 N. Y. 241, 253; *New York v. Colgate*, 12 N. Y. 140, 146; and *People ex rel. McConvill v. Hills*, 35 N. Y. 449,—to the effect that the constitutional requirement was designed to do away with a notorious practice of imposing upon legislators who depend upon the titles to bills for their knowledge of the contents, and of imposing upon the public as well, and that it is mandatory.

It takes very little knowledge of the course of legislation to understand how a title to a local bill, not calculated to inform the people affected of what is impending, coupled with an assurance by the person in charge that it is of a purely local character, may cover and obscure a proposition that never ought to and never would be enacted into law if accompanied by that publicity necessary to invite legitimate

opposition from without the legislature, and inform legislators of its real character; and yet with the assurance that it is purely a local bill, and has the approval of the local member or members, such dangerous and mischievous proposition may reach the office of the secretary of state as a law, in form, and the persons affected only discover its character when there is no recourse left for them except that which the wisdom of the framers of the constitution has provided. No! a challenge of the sufficiency of a law, under the constitutional restruction as to its title, is not a technical objection to be treated lightly by the courts. It is an invocation of a positive limitation upon legislative power, which the court cannot treat lightly without being guilty of usurpation. True, in such a case the title to the act must be liberally construed, giving all reasonable leeway for the exercise of legislative discretion. True, it should not be held insufficient if a reasonable doubt exists as to its sufficiency. But, just as true, the letter and spirit of the constitution should be maintained in all its integrity, by holding that a title is insufficient if so defective as not to reasonably suggest the purpose of the act it covers, so that in reading the act, with the full scope of its title in mind, provisions will not be found which are clearly outside thereof. If such a discovery be made, the court cannot give an unreasonable construction to the title, to bring the body of the act within it. The title must stand or fall as it is written, and without regard to consequences. In no other way can the purpose of the constitutional limitations be effective. *In re Paul*, 94 N. Y. 497.

But it is said, conceding that the title to each of the acts considered is by itself insufficient as we find it in the published laws,—and we assume this concession to include ch. 137, Laws of 1878, amending that of 1877, not heretofore much referred to in this opinion, since if one falls all must,—that of 1876 is cured by reference to the journal of the assembly,

and the titles to the other acts are cured by reference to the first. The conclusion which counsel confidently contend for could not in any event be readily adopted. Whether it is sound or not need not be discussed or decided, since we cannot agree to the premises upon which it is based. The journal of the assembly shows that during the session of the legislature of 1876 a bill was considered and passed known as "353 A.," entitled "A bill to fix a salary for the sheriff of Milwaukee county," and that a bill bearing the same number, entitled the same as the published law, was assented to by the assembly as being correctly enrolled and ready for the necessary authentication before passing from the control of the legislature to the governor for his approval. On that showing it is said we must say the bill as passed was correctly entitled, because the court takes judicial notice of the journals of the two houses of the legislature for the purpose of determining whether bills were actually and constitutionally passed; that is, what was done in regard to the passage of bills. *McDonald v. State*, 80 Wis. 407; *State ex rel. Isenring v. Polacheck*, 101 Wis. 427. We have then this situation: The constitutional limitation upon legislative power as to the title of a bill is satisfied, if such title be perfect at the time the bill is finally acted upon. *Attorney General v. Rice*, 64 Mich. 385; *Binz v. Weber*, 81 Ill. 288. The presumption is that the title to the act in question, as found in the published laws, accords with its title when passed by the legislature, and that presumption must prevail till satisfactorily rebutted. The journal of the assembly shows that when the bill in question received final legislative assent, as the correct expression of the legislative will, it bore the title now found in the published laws. Such journal further shows that the bill, during the proceedings in the legislature leading up to its enrollment, bore a different title. On such showing it is said that the published law can be impeached by such journal, and is impeached by the references therein

to the bill we have mentioned, and that the court must so decide regardless of what the original bill itself shows, or any other evidence within reach of the court, because the court must take judicial notice of the contents of such journals and cannot properly look further.

We are unable to say that the presumption with which we must start in our investigation, viz., that the published title corresponds to the title of the bill at the time of its passage by the legislature, is overcome by the journal entries. The purport of the report of the committee on enrolled bills is that the bill in question, as approved by them, in its enrolled form, was a correct copy of the bill that passed the two houses of the legislature. That report was assented to. The result was duly authenticated and sent to the governor. Moreover, the scope of the rule that courts take judicial notice of the journals of the two houses of the legislature, and the effect of such journals as evidence, are misapprehended by respondent's counsel. While such journals are controlling as regards what the legislature does in respect to the passage of a bill (*People ex rel. Barnes v. Starne*, 35 Ill. 121), they are not necessarily so as to the contents of a statute. On the latter subject courts may look to the enrolled bill, to the engrossed bill, and to any other legitimate evidence within their reach. *Evans v. Browne*, 30 Ind. 514; *Sherman v. Story*, 30 Cal. 253; *Sup'rs Ramsey Co. v. Heenan*, 2 Minn. 330; *Fouke v. Fleming*, 13 Md. 392; *Gardner v. Collector*, 6 Wall. 499; *In re Duncan*, 139 U. S. 449, 456; *Jones v. U. S.* 137 U. S. 202, 216; *Lyons v. Woods*, 153 U. S. 649.

It must be understood that when the existence or the contents of a statute are called in question, no issue of fact is presented for a trial upon the evidence, but the court, whether one of original or appellate jurisdiction, must necessarily decide the question the same as it decides any other question of law. In *Gardner v. Collector, supra*, it is said that 'judges, when called upon to determine the existence or the contents

of a law, may resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to the question.' The same court said, in *Jones v. U. S.*, *supra*, speaking by Mr. Justice GRAY: "In the ascertainment of any facts of which they are bound to take judicial notice, . . . the judges may refresh their memory and inform their conscience from such sources as they deem most trustworthy;" and, "upon the question of the existence of a public statute, . . . they may consult the original roll or other official records." In *In re Duncan*, *supra*, the same court held that it might make such an investigation, though it was omitted by the state court which was first called upon to act. In *Sup'rs Ramsey Co. v. Heenan*, *supra*, it was said that the court, in solving a question regarding the constitutionality of a law, may examine the original bill as well as the journal.

What has been said clears the way for the court to examine the original bills in question in this case, and the result of such an examination is that they are found to be entitled the same as the published laws, leaving no room to say that they were not, at the time of their passage, the same in all respects as such published laws indicate.

The rule, that practical construction of a law will be regarded by the court as controlling after long acquiescence, is invoked. That rule is familiar, and that it may apply where a constitutional question is involved. *Dean v. Borchsenius*, 30 Wis. 236. But it has no application to a legislative enactment which, in neither its literal sense nor its application to the subject it affects, is ambiguous. In such a case there is no room for the operation of the rule of practical construction, or any other. The act must be taken to mean what its language obviously indicates, regardless of the length of time that a contrary view has obtained. *Travelers' Ins. Co. v. Fricke*, 94 Wis. 258, 265.

Another question is presented for decision, namely, Does

the legislation in question violate sec. 23, art. IV, of the constitution, requiring that there be but "one system of town and county government, which shall be as nearly uniform as practicable"? The suggestion is made that any system of county government must include offices and a method of filling them, and of compensating the incumbents for their services, and that every part of such system is as essential to the whole and the uniformity thereof as any other. There is reason in that, and yet we hesitate to say, at this time, that it is decisive. The question presented is so important, as regards its effect upon existing laws and the future exercise of legislative power, as to warrant the court in omitting to solve it except upon the fullest argument and a necessity therefor. That necessity does not exist here, because the conclusion which we have already reached upon the other branch of the case is conclusive of the appeal. Whether such legislation as is here questioned was contemplated by the framers of the constitution, or can be sustained, under the requirement as to uniformity of county government, admits, at least, of very serious doubt. That suggestion, probably, will be sufficient to admonish those who may be responsible for further legislation to accomplish the object of that we have condemned upon another ground, and the lawmakers generally, of the importance of so shaping their work as to make it conform to all the constitutional checks upon legislative power. The mischief that may be done by want of care in that regard, resulting in laws good in form but bad in fact,—laws that may be recognized as valid for a long term of years before coming under the scrutiny of the court,—cannot be overestimated. All must understand that we live under a constitutional government. There is no absolute freedom of action in any branch of it. The limitations upon the legislative branch are numerous and of the highest importance. The legislature may go through the form of making any kind of a law, but unless

the result stand the test of those wise limitations which wisdom dictated in our constitution, it must fail, regardless of the consequences. All the mischiefs that flow from unconstitutional enactments lie at the doors of those who are charged with the duty to make laws. The benefits of the system which leads to that — and they are supposed to be of inestimable value — will be in great part lost by any hesitation in condemning a law as void that is manifestly so, by that branch of the government which is charged with that duty.

By the Court.— The order appealed from is reversed, and the cause is remanded with directions to sustain the demurrer and for further proceedings according to law.

MALLOY, Respondent, vs. THE CHICAGO & NORTHWESTERN RAILWAY COMPANY, Appellant.

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109 259
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110 [1]571
58 LRA 833
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113 [1]296

January 9 — February 1, 1901.

Limitation of actions: Notice of injury: Construction of statutes: Pleading.

1. The provision of sec. 4222, Stats. 1898, that no action to recover for an injury to the person shall be maintained unless within one year after the accident notice in writing shall be served on the person or corporation sought to be charged with liability, stating the time and place of the injury, etc., is a statute of limitation and does not prescribe a condition precedent to the right to sue.
2. Looking to the legislative purpose, and in order to avoid absurd consequences, the words "shall be served," in said sec. 4222, Stats. 1898, are construed to mean "shall have been served," and the requirement that notice be served within one year is *held* inapplicable where the action is commenced within that time.
3. Although the complaint in an action for personal injuries alleged the giving of the notice required by sec. 4222, Stats. 1898, a general denial did not put the defendant in a position to rely upon the limitation as a bar to the action, plaintiff's cause of action being complete without such allegation.

4. In order to avail himself of the defense of the statute of limitations a party must, in his pleading, either refer to the statute or set out the facts showing that the limitation has run.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This action was begun April 6, 1898, to recover damages for injuries received by the plaintiff November 14, 1897, while operating a switch in defendant's yard, alleged to have been defective and out of repair. The complaint alleged the giving of a notice of injury on April 4, 1898. The defendant answered this allegation by a general denial. At the trial the plaintiff made proof of the accident, and introduced the notice of injury in evidence. This notice is conceded to be insufficient under Stats. 1898, sec. 4222. A motion for nonsuit was denied. The defendant then asked permission to amend its answer by setting up the statute of limitations, which was also denied. The jury returned a special verdict assessing plaintiff's damages at $1,000, for which amount judgment was duly entered, and from which defendant takes this appeal.

For the appellant the cause was submitted on the brief of *Edward M. Hyzer.*

For the respondent there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *W. H. Timlin.*

BARDEEN, J. Sec. 4219, Stats. 1898, provides that "the following actions must be commenced within the periods respectively hereinafter prescribed after the cause of action has accrued." Sec. 4222 limits the time for the commencement of an action to recover damages for an injury to the person to six years. It also contains a provision as follows: "No action to recover damages for an injury to the person shall be maintained unless, within one year after the happening of the event causing such damage, notice in writing, signed by the party damaged, his agent or attorney, shall

be served . . . stating the time and place where such damage occurred . . . and that satisfaction therefor is claimed of such person or corporation." This statute was under consideration in the recent case of *Meisenheimer v. Kellogg*, 106 Wis. 30. Among the grounds urged against the sufficiency of the complaint was that the notice of injury set forth therein was not sufficient, and that such notice was a condition precedent to the cause of action. This contention was distinctly overruled on the ground that the cause of action was one that existed at common law, existing independent of statute, and that the requirement of notice simply set a new limit within which a certain step necessary to enforce the right of action must be exercised. In other words, the statute was one of limitation, and not a condition precedent to the right to sue. *Gatzow v. Buening*, 106 Wis. 1. It necessarily follows therefrom that an allegation of notice to the party who caused the injury was not essential to the cause of action stated. Neither allegation nor proof of service of such notice being necessary to the plaintiff's right to maintain his action, a statement in the complaint of the giving of such notice, and a denial in the answer, presented no issue fatal to the plaintiff's recovery. The cause of action was complete without such allegation, and a mere denial of it did not put the defendant in position to rely upon the limitation as a bar to the action. It has long been the rule of pleading that a party relying on the statute of limitations must plead it, or he cannot avail himself of that defense. Either the statute must be referred to, or the facts showing the limitation has run must be set out, in the pleading, or it is waived. *Lockhart v. Fessenich*, 58 Wis. 588. See, also, *Orton v. Noonan*, 25 Wis. 672.

There is, however, another reason why this judgment must stand. The accident occurred November 14, 1897. The action was begun April 6, 1898. If the statute is considered to apply to actions begun within one year after the accident,

we have the absurd result of a limitation running against a cause of action after suit has been commenced to enforce it. It is a cardinal rule of construction that the courts may and should look into so much of the intent of the act as is discoverable from its words and from the permissible surroundings. Bishop, Written Laws, § 76. The interpretation should lean strongly to avoid absurd consequences. Id. § 82; *Jeffersonville v. Weems*, 5 Ind. 547; *Comm. v. Loring*, 8 Pick. 370; *Henry v. Tilson*, 17 Vt. 479. The court should also consider the legislative purpose, and keep steadily in view "the mischief to be cured." *McCaul v. Thayer*, 70 Wis. 138; *State ex rel. Heiden v. Ryan*, 99 Wis. 123. Prior to the enactment of this statute a person suffering injury to his person had full six years to commence his action, and he was not required to give any notice of his intention. The necessity of notice arose from the fact that many claims were being prosecuted after long delays, when witnesses had disappeared or the circumstances were forgotten, and the means of evidence had been lost or destroyed. Instances arose when the defendant was put to a great disadvantage by failure to preserve evidence, death of witnesses, or change in the physical features surrounding the accident. This was undoubtedly "the mischief to be cured." Unquestionably, the legislative purpose was to require the injured party to inform the other within a reasonable time, fixed at one year, of his intention to hold him responsible. If he did so, then he might commence his action any time within six years. If he did not, then his right would be forfeited. The primary purpose seems to have been that notice should be given to afford the defendant an opportunity to investigate the circumstances before they got stale, and to preserve evidence for his defense. It had no bearing upon the right of action, beyond being a mere limitation, and as affecting the remedy. If by the commencement of an action the defendant is advised of all the facts which were considered essential in a

notice, the giving of such notice after suit brought would seem to be an idle ceremony. It would have no gravity, beyond the mere fact that, by a literal construction, the act required it. To apply it to suits commenced within the year, and say that such an action is barred after it has been commenced, dignifies the requirement into a condition precedent, when in fact it is one of limitation. No such absurd result can be tolerated, if by a permissible legal construction it can be avoided. A statute of limitations cannot run against an action after it has been commenced. To avoid absurd or injurious consequences, courts frequently construe words in some other tense than used in the act. Thus, in *Maysville & L. R. Co. v. Herrick*, 13 Bush, 122, the words "shall come" were construed as equivalent to "shall have come." In *Rutherford v. Green's Heirs*, 2 Wheat. 196, the words "shall be" were construed to mean "is." An application of these rules to the statute in question, construing the words "shall be served" to mean "shall have been served," would relieve it of the objection urged, and still preserve the evident purpose of the legislature.

By the Court.—The judgment is affirmed.

KANE, Administrator, Respondent, vs. HERMAN, imp., Appellant.

January 9 — February 1, 1901.

Contracts: Guaranty: Release of one guarantor: Alteration of promissory note: Implied consent.

Several stockholders of an embarrassed corporation, being guarantors of its indebtedness to a large amount, made an agreement among themselves by which one of them, C., in consideration of his incumbering certain of his private property as security for a portion of said debts, was to be released from liability upon another por-

tion, including a negotiable promissory note not yet due, but the ultimate loss sustained by the failure of the company to pay its debts was to be shared equally by the guarantors. Thereafter, with the consent of the payee, C.'s name was erased from the guaranty on said note. *Held* that, even if the other guarantors did not expressly assent to such physical erasure of C.'s name, yet such assent should be implied from the other terms of their agreement, and the alteration of the note did not, therefore, release them from liability thereon.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

In July, 1893, the appellant, together with Cook, Hyde, Hadfield, and Brand, were interested as stockholders in the Gothenburg Water Power & Investment Company, which was in embarrassed circumstances. They were liable, all or some of them, upon about $200,000 of indebtedness of that company, including a negotiable, undue note of $8,000 to A. L. Kane, upon which was a guaranty of payment signed, in the following order, by A. H. Hadfield, Cook & Hyde, *Henry Herman*, and M. H. Brand. A conference was had as to a method of providing for this mass of indebtedness, so that its enforcement should not bring ruin upon the individuals as well as upon the corporation. As a part of that negotiation, it was arranged that Mr. Cook, one of the firm of Cook & Hyde, would incumber certain private property of his own as security for those debts, excepting about $42,000 worth, which included the note in question; he insisting that the firm name had been signed to the guaranty of that note without his consent or approval. It was accordingly arranged and agreed by all of the guarantors to that note that Mr. Cook, in consideration of making the security aforesaid, should be released from liability upon the $42,000 in question. Thereafter, in July, 1893, a written agreement was entered into between the parties, reciting the above-mentioned indebtedness in detail, the liability of the several parties thereon, the mortgaging of the property

of the corporation, and the furnishing of security by Cook, and, as an additional recitation and agreement, contained the following:

"Whereas, it has been agreed between the parties hereto that the said Cook shall be released from his indorsement upon certain of said liabilities amounting in all to the sum of $42,000, but notwithstanding such release it is understood and agreed that in adjusting between the parties hereto the losses, if any arise, by reason of the inability of the said Gothenburg Company to pay its said debt represented by said notes, or any part thereof, that the parties hereto shall stand upon an equal footing, and shall pay each one fifth of the ultimate loss sustained by reason of the failure of said company to pay its debt or any part thereof: Now, therefore, this indenture witnesseth that the said *Herman* is to relieve the said Cook from indorsements upon the following notes, that is to say:

Charles Friend	$20,000
G. P. Sanborn	3,000
George Ellis	6,000
Making in all	$29,000

"That the said Brand is to relieve said Cook from his indorsements on the following notes, that is to say:

A. L. Kane	$8,000
James A. Bryden	5,000
Making in all	$13,000

"And arrange to take up said notes so that the said Cook shall be relieved of all liability thereon."

This was followed by the further agreement that the parties should share, as between themselves, in specified proportion, any sums which they were compelled to pay, and that the agreement was merely for the purpose of enabling the parties to adjust the amount of their liability on said indebtedness between themselves, and that it was not to operate in any way as a promise in favor of any creditor of said company. Thereafter, without specific knowledge of the appellant, *Herman*, Brand, who had agreed to relieve Cook from liability upon the Kane note, procured the consent of Kane that Hyde, Cook's partner, might erase the firm name of Cook & Hyde from the guaranty on that note, which was

accordingly done by drawing a pen through it, and the name of Hyde then added to the signers of the guaranty. The note was in this condition when offered in evidence. As to whether or not, in the arrangement for the release of Cook from certain liabilities, it was expressly agreed and consented to that his name should be physically stricken from the guaranty, there was conflict of evidence. The note was never paid, and this action was brought thereon against the corporation and all of the signers of the guaranty. Verdict was directed in favor of the plaintiff against all of the defendants except Cook, from judgment whereon the defendant *Herman* appeals.

For the appellant the cause was submitted on the brief of *Quarles, Spence & Quarles.* They contended, *inter alia,* that whether consent to the erasure was to be implied from the written agreement was a question depending upon extrinsic facts and should have been left to the jury. *Barreda v. Silsbee,* 21 How. 146–168; *Iasigi v. Brown,* 17 How. 182; *Stoops v. Smith,* 100 Mass. 63–66; Thompson, Trials, §§ 1072, 1073, 1082, subd. 2, 1098; *West v. Smith,* 101 U. S. 263–270; 1 Greenl. Ev. § 277; *Holmes v. Montauk S. Co.* 93 Fed. Rep. 731, 735; *Sheehy v. Duffy,* 89 Wis. 6.

For the respondent there were separate briefs by *George L. Williams,* attorney, and *Winkler, Flanders, Smith, Bottum & Vilas,* of counsel, and oral argument by *Mr. Williams* and *Mr. J. G. Flanders.*

Dodge, J. The appellant's contention is that although he, in common with the other guarantors, consented to the release of defendant Cook from liability upon the note in suit, he did not consent to the physical erasure of Cook's name therefrom, and that the promissory note and guaranty thereof, when offered in evidence, presented upon its face a material alteration, and could not properly have been received, nor could it serve as a basis of recovery in an action

predicated thereon. There is no substantial controversy that all the parties did agree that Mr. Cook should be released upon this note and guaranty. That is evidenced by the oral testimony as to the verbal agreements, and by the recitation in writing of the existence of such an agreement. The situation disclosed was that of several individuals undertaking, each separately, to finance and provide for a considerable volume of indebtedness in the midst of the panic period in July, 1893, at a time when the presence of ostensible liability, or liability for which one might be required to respond, although he had a perfectly good claim on others for reimbursement, might be a very serious obstacle to his plans for carrying and providing for that which he in fact ought to pay. So that the extinction of Cook's even ostensible liability must have been well understood to be very material to him by all of the parties to that negotiation, including the appellant. Again, the idea involved in the release was not extinguishment as among themselves of so much of Mr. Cook's share of the liabilities which all had assumed for the corporation, because the parties, *ex industria*, entered into a stipulation as to how they would divide among themselves all such liability as fell upon them respectively. The expression "release" must therefore have been used by the parties with reference to the particular instrument, and must have intended release of the specific liability *to the creditor*, in order to accomplish the purposes which they all had in mind. How did they intend that such result be attained? It appears, and was of course known to all parties, that the instrument held by Kane, and guaranteed by the several defendants, was a negotiable promissory note, still having some three months to run. It was therefore liable on any day to reach the hands of an innocent holder for value, who would have the right to enforce it according to the very words thereof, regardless of any agreement either among the guarantors or between the guarantors and the creditor, Mr. Kane. There was

therefore no way possible to accomplish the purpose, and to release Mr. Cook from the peril of being called on to pay that note, except by alteration of the instrument itself, either by striking his name from the list of guarantors, or by some other alteration which should declare his nonliability. It is therefore an irresistible conclusion, from the agreement which the parties confessedly made for the release of Mr. Cook from this note, that they contemplated and authorized such acts as would effectuate that release; and, although there is conflict of evidence as to whether the physical erasure of Cook's name was expressly assented to, we are constrained to hold that assent thereto was given by implication from the other terms of that agreement.

Of course, as a result of this view, the paper, when offered in evidence with the explanation, though altered, was shown to have been altered by the consent of the appellant, and was admissible in evidence, and such alteration had no effect to discharge him from liability thereon. The trial court, therefore, was right in directing a verdict for the plaintiff as against this appellant.

By the Court.—Judgment affirmed.

ASCHERMANN, Respondent, vs. HART and another, Garnishees, Appellants.

January 9 — February 1, 1901.

Garnishment: Agreement to pay debts of another: Election to sue original debtor.

In consideration of the rescission of an oral contract by which parents had sold a hotel and its equipment to their son, and of the return to them of the property with the improvements made by the son, the parents agreed to pay the debts of the son incurred in the business. A creditor of the son elected to sue him, and garnished the parents. *Held*, that thereby the unpaid purchase money in the hands of the garnishees became due to the principal defendant, and hence was subject to garnishment.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an appeal from judgment against the appellants in a garnishee proceeding. The respondent, *Aschermann*, was a creditor of one Charles P. Hart in the sum of $472, and brought action thereon April 15, 1897. At the same time he garnished the appellants, *Peter Hart* and *Anna Hart*, who denied all liability, and the respondent took issue upon such denial. Judgment was obtained against the main defendant February 27, 1899, for the amount of the debt, with interest and costs, amounting in all to $553.22, and thereafter the garnishee action was tried before the court without a jury. The trial court found as facts, in substance, that the garnishees are, and for many years have been, husband and wife; that *Anna Hart*, in the spring of 1893, owned, and for twenty years prior thereto had owned, a certain hotel property in Milwaukee, and that for about twenty-five years prior to the spring of 1893 the garnishees together had conducted a hotel business therein in the name of *Peter Hart*, deriving their livelihood out of said hotel business; that in the spring of 1891, *Anna*, with the consent of *Peter*, leased the hotel property, with its equipments, to the main defendant (who is a son of *Peter*, but not of *Anna*), who occupied the same as tenant until the spring of 1893; that in March, 1893, Charles purchased of *Anna*, with the consent of *Peter*, the hotel property, and all the furniture and personal property in it, for $33,000, paying $2,200 down, and agreeing to pay interest on the balance in monthly instalments, as well as the taxes and insurance, and went into possession thereof, and so remained up to March 1, 1897, making many valuable improvements on the property, and refurnishing the same; that this arrangement was by parol, no deed being executed; that in February, 1897, Charles being in default in several payments of interest and unable to carry on the business successfully, it was agreed between Charles and the gar-

nishees that the sale should be rescinded, the real and personal property should be returned to the garnishees, and that in consideration of the return of the property, including the improvements made by Charles, the garnishees each agreed with Charles to pay his debts incurred in the business; that the plaintiff's debt was one of the debts incurred in the business; and that, therefore, the garnishees were indebted to the main defendant in an amount exceeding the plaintiff's judgment, and were liable as garnishees, and judgment was ordered and rendered holding them liable. Exceptions were duly taken to nearly every sentence of the findings.

For the appellants there was a brief by *Herbert J. Piper* and *Jared Thompson, Jr.*, and oral argument by *Mr. Thompson.*

C. A. Koeffler, Jr., for the respondent.

WINSLOW, J. If the facts are as found by the trial court, the judgment against the garnishees must be affirmed. The facts so found are, in brief, that the garnishees, in consideration of the return to them of the real and personal property held by Charles, and the rescission of the contract of sale, agreed to pay all of the debts of Charles incurred in the business, of which the plaintiff's debt was one. The plaintiff declined to collect his debt from the garnishees, but elected to sue the original debtor; thereby the unpaid purchase money in the hands of the garnishees became due to Charles, and hence was subject to garnishment. *Greene & Button Co. v. Remington*, 72 Wis. 648. We have examined the evidence, and find it sufficient to sustain the findings of the trial court. There was much dispute, but it certainly cannot be held that the findings are against the clear preponderance of the evidence. We have found no other questions of sufficient importance to justify a discussion of them.

By the Court.—Judgment affirmed.

BULLEN, Respondent, vs. MILWAUKEE TRADING COMPANY, imp., Appellant.

109 41
113 [2]390

109 41
115 [2]589

January 9 — February 1, 1901.

(1) *Trial: Submission of issues: Immaterial error.* (2–4) *Corporations: Contracts:* Ultra vires: *Authority of officers: Promissory notes.*

1. If all the issues of fact raised by the pleadings, that are controverted on the evidence, are submitted to the jury for determination, the omission to submit other issues is not reversible error.
2. If a person, acting in good faith, contract with a corporation upon the strength of the apparent authority of those acting in its behalf, and the corporation receive the benefit of the contract, it is bound, regardless of whether its agents had actual authority in the premises or the contract was within the scope of its corporate powers.
3. If the officers of a corporation, who, customarily, are empowered to act in its behalf, execute a promissory note in its name, and cause such execution to be authenticated by the corporate seal, the presence of such seal upon the instrument carries with it *prima facie* proof of authority in fact to execute the paper.
4. If a corporation, by its officers having apparent authority to do so, execute an instrument in the form of a promissory note, cause the same to be indorsed by the payee, transfer it to a third person, taking therefor a check payable to the order of the treasurer of the corporation,— which check is delivered to such treasurer as the proper custodian of corporate property of that kind,— and the check is duly presented for payment and paid, the proceeds of the note must be regarded as having reached the corporation, regardless of whether its officers had actual authority in the matter or not, or what subsequently became of such proceeds.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Affirmed.*

Action to recover on a note of which the following is a copy:

"$1,500.00. Milwaukee, Wis., Aug. 28th, 1896.

"One year after date *Milwaukee Trading Company* promises to pay to the order of Win. J. Morgan & Co., at their office, 411, 4th floor, Pabst Bldg., fifteen hundred and no-100ths dollars, value received, with interest at the rate of 7 per cent. per annum.

"MILWAUKEE TRADING CO. [Corporate Seal.]
"By Fred Bjorquist, Pres.
"By Win. J. Morgan, Secy."

The complaint contained the necessary allegations to entitle plaintiff to recover against the maker and indorsers of the instrument as negotiable commercial paper. The answer put in issue the authority of the officers of the corporation to make the instrument and alleged that it was made by the firm of Win. J. Morgan & Co. as a means of availing themselves of the credit of the corporation for their own use; that the instrument was not negotiable; that no consideration was received for it by the corporation; and that plaintiff took it charged with knowledge of the facts.

On the trial plaintiff produced the note and it was received in evidence. Evidence was also offered and received showing that the members of the firm of Win. J. Morgan & Co. owned all of the stock of the corporation except two shares; that its financial operations were wholly conducted through the firm; that the members of the firm were directors of the corporation; that they were accustomed to manage the corporate business as if it were theirs exclusively; that they used the corporate name as a cover for their private operations; that such was the real purpose of the corporation, that is, that it was an organization designed to enable Win. J. Morgan & Co. to do business under a corporate name; that they, as officers of the corporation, were accustomed to make notes and then to negotiate them as the firm of Win. J. Morgan & Co. when the corporation needed money, passing the proceeds to its credit in an account between it and the firm, and charging it with the money paid out in the business done by them in its name; that the note sued on was negotiated with one Haskins, he giving his check therefor, payable to the corporation, which check was delivered to the secretary and treasurer of the corporation, and was by him realized on, the money being credited as usual to the corporation in the account of Win. J. Morgan & Co. with it.

There was further evidence tending to show that a settle-

ment was made between Win. J. Morgan & Co. and the corporation in which the latter received the full benefit of the proceeds of the note. There was further evidence from which defendant claimed that when the note was negotiated the corporation was not indebted to Win. J. Morgan & Co., and that there never was any legitimate indebtedness on the part of said firm against the corporation upon which the credit of the proceeds of the note could have been applied. There was no evidence showing that plaintiff and his assignor did not obtain the instrument sued on for value before due and without notice of any infirmity therein.

At the close of the evidence plaintiff's counsel moved the court for the direction of a verdict in his favor, which was denied. Thereupon, at the request of counsel for the corporation, the court submitted the cause to the jury to determine whether it received value for the note. The result was a finding in plaintiff's favor, upon which judgment was rendered for the full amount due upon the note according to its terms, with costs. From that judgment this appeal was taken.

For the appellant the cause was submitted on the brief of *Turner, Pease & Turner.*

A. B. May, for the respondent.

MARSHALL, J. Several questions are discussed in the brief of counsel for appellant, the solution of which is not necessary to a determination of this appeal, because if the one submitted to the jury was properly answered, the fact found is conclusive.

It is said that all the material issues were not submitted to the jury. There is no reversible error in that if all the issues of fact on the pleadings, that were controverted on the evidence, were so submitted. *Weisel v. Spence,* 59 Wis. 301; *Stringham v. Cook,* 75 Wis. 589; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 312. The issue that counsel suggests

was improperly omitted from the submission to the jury, is that in regard to the authority of the officers of appellant to execute the note in its behalf. On that subject the evidence was all one way. Had a question been submitted it would reasonably have admitted of but one answer. The evidence shows, without room for reasonable controversy, that prior to the making of the note the business of the corporation was customarily conducted by the persons who pretended to act in its behalf in the instance in question, and that such business included the making of instruments of the kind in suit; that all the affairs of the corporation, in fact, so far as the public was concerned, were intrusted to those persons who composed the firm of Win. J. Morgan & Co., and that whatever they did, pretending to act for the corporation, was always recognized as binding upon it. Under such circumstances a corporation is bound by the acts of those whom it holds out as its agents precisely the same as is a private person. The idea that every time a person deals with an officer of a corporation, or person assuming to act in its behalf, he must under all circumstances take his chances on whether such officer or person has been specially authorized in regard to the matter, has no place in the law in our day. Proof of apparent authority of a corporate officer to contract in its behalf *prima facie* establishes actual authority so to do, and evidence of want of such authority will not relieve the corporation from the burden of a contract made with reasonable reliance upon such apparent authority, if such corporation is responsible for such appearance. *Ford v. Hill*, 92 Wis. 188; *McElroy v. Minn. P. H. Co.* 96 Wis. 317.

There is no evidence to rebut the proof of apparent authority to execute the note. All the indications from the evidence are that such authority was relied upon, and without negligence, by all the persons who became interested in the note. Again, the fact that the note was executed under

seal carried with it *prima facie* appearance of authority, and made *prima facie* proof thereof, which is not weakened by any circumstance or evidence that appears in the record. Thompson, Corp. §§ 4623, 4624; *McElroy v. Minn. P. H. Co., supra.*

There is a further conclusive answer to the complaint that the court failed to submit the question of the authority of the officers of the corporation to make the note. The request made to the court to submit the single issue as regards whether the corporation received consideration for the note waived the submission of any other question of fact.

But it is said the note was issued without consideration and came to the possession of plaintiff affected with that infirmity. On this branch of the case it seems to be conceded that if the finding of the jury is right the judgment must stand, because if the corporation received consideration for the paper it cannot be heard to deny liability thereon even though its officers had no authority to make it and the corporation no legal authority to empower them to do it. The doctrine of *ultra vires* cannot be invoked by a corporation for the purpose of escaping a burden resulting from a contract so far executed that the corporation has received the benefit thereof. That most wholesome doctrine is well established. *John V. Farwell Co. v. Wolf*, 96 Wis. 10; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125. Such doctrine, with that other to which we have adverted,— that corporations, like individuals, are bound by the apparent authority of their agents for which they are responsible,— is reasonable and necessary to modern methods of doing business. Without those certain safeguards it would be impossible to transact business without intolerable embarrassments. If a corporation offends against the law of its creation by a transaction so far consummated that it has become possessed of the fruits thereof, it cannot shield itself from the consequences by the doctrine of *ultra vires*. It may be

punished by the state against whom the offense was committed, but is powerless to add to the wrong by invoking the doctrine of *ultra vires* to perpetrate a fraud upon an innocent member of society. Again, if a corporation has power to contract as to a particular matter, and is responsible for the appearance of authority of a person who assumes to act in its behalf in that field, another acting in good faith may safely rely on such appearance; and if it is not supported by authority in fact the corporation must look to its guilty agent for redress, the same as an individual under like circumstances, rather than that the innocent person shall be made to suffer the consequences of the wrong. It follows that the finding of the jury, if right, renders all other questions immaterial.

It is argued that the verdict is contrary to the evidence because it appears conclusively that the proceeds of the note were absorbed by Win. J. Morgan & Co. on the pretense of crediting the same to the corporation; that there was no indebtedness of the latter upon which such proceeds could have been legitimately applied. Looking at the record as favorably as we can for appellant, there is credible evidence both ways on that subject, and also evidence tending to show that the credit to the corporation actually entered into a settlement between it and the firm, in which the corporation received the full benefit of the note. In that view, it cannot be said but that the verdict is supported by the evidence. But let that be as it may, the evidence shows without reasonable controversy that the corporation received the proceeds of the note before the same came to the hands of Win. J. Morgan & Co. True, it is said there is reasonable ground for the belief that the check claimed to have been received for the note was used in a transaction that had no connection with the paper, but we cannot understand the evidence that way. It was dated September 21, 1896, was made by Haskins, respondent's indorser, and

was for $1,992.70. The difference between the amount of the check and the face of the note is fully accounted for. Win. J. Morgan testified positively, and his evidence does not seem to be weakened by any other, that the check represented the proceeds of the note. It was made payable to the corporation and delivered to its secretary and treasurer, and was by him realized on as such secretary and treasurer, the money being then credited by him in the account between the corporation and Win. J. Morgan & Co. In that situation it must be said that the proceeds of the note came first to the possession of the corporation and that its status thereby became fixed. If the corporate officers thereafter embezzled the money of the corporation or converted it in any way to their own use, that did not change the relation of the corporation to the holder of the note. As to him it received a full consideration for the instrument. The loss to the corporation, if there was such loss, left it bound to pay the note just the same. In that aspect of the case,—and in our judgment it is the true one,—respondent was entitled to a judgment upon the evidence as a matter of law, and the motion to that effect should have been granted at the close of the evidence.

By the Court.—The judgment is affirmed.

BAUM, Respondent, vs. BAUM, imp., Appellant.

109	47
115	*286
60 LRA	411
60 LRA	419
61 LRA	647

January 9—February 1, 1901.

Husband and wife: Agreement to separate and to assign insurance policy: Consideration; Public policy: Separate estate of wife.

1. An agreement between husband and wife for voluntary separation is against the legislative policy of this state and is absolutely void.
2. An oral agreement by a husband to assign insurance policies to his wife, which has no consideration so far as the husband is con-

corned except a covenant on the part of the wife to separate and live apart, is without a valid consideration and will not be enforced, even though it has been partially or imperfectly executed. Sec. 2347, Stats. 1898 (permitting a husband to assign a policy of insurance to his wife), has no application to the question.

3. Where the wife in such a case had no property, an action to enforce the agreement to assign the insurance policies is not an action regarding her separate estate.

APPEAL from an order of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Reversed.*

A demurrer to the complaint on the grounds that the plaintiff has no legal capacity to sue, and that it does not state facts sufficient to constitute a cause of action, was overruled. The complaint is quite lengthy, and contains very much irrelevant and redundant matter. Excluding the rubbish, the alleged cause of action may be briefly stated as follows:

Plaintiff and defendant are husband and wife, and have three children under age. For more than two years prior to September, 1897, defendant treated the plaintiff in a cruel and inhuman manner, and neglected to provide for his family, and plaintiff had determined to begin an action for divorce. About the 1st of September, 1897, the plaintiff and defendant agreed to live separate and apart, and the defendant thereupon agreed to contribute sufficient money to support his family, and to make an absolute and unconditional assignment to plaintiff of two policies of insurance on his life in the Northwestern Mutual Life Insurance Company, which policies were clear of all claims except a loan of $835 from the company to the defendant. Defendant also agreed to pay the premiums on said policies and keep them in force. Relying upon said agreements, plaintiff refrained from commencing an action for divorce. The policies of insurance were held by the company as security. About October, 1897, the plaintiff was informed by defendant and by an agent of the company that assignments had been executed. De-

fendant failed to contribute money to support his family and pay the premiums on said policies. Plaintiff, fearing that defendant would not pay the interest on his loan, and, supposing that the assignment to her of said policies was absolute, in February, 1899, raised the money and paid the loan to the company, then amounting to $1,029.93. The policies and assignments were delivered to her, and then she learned that defendant had reserved the power to make choice of any tontine options granted under the conditions of said policies, and personally to receive the benefits therefrom, without the consent of the assignee; and, in case of the latter's death before said policies became due, the proceeds were to become payable to defendant's representatives or assigns. Upon receiving this information she notified the company of the interest she claimed in the policies under her agreement with her husband. Thereafter she demanded of the defendant that he carry out his said agreement and make an absolute and unconditional assignment of said policies, which he has refused to do. She paid premiums on said policies amounting to $78.90. She brings this action against her husband and the insurance company, and asks that said assignments be adjudged to be absolute and to vest the beneficial interest in said policies in her, and that the company be required to pay her all sums due or to become due to her. The defendant *Baum* has appealed.

For the appellant there were briefs by *Turner, Pease & Turner*, and oral argument by *J. H. Turner*. They argued, among other things, that voluntary agreements for separation between husband and wife are void except under certain conditions. *Evans v. Evans*, 93 Ky. 510; *Rogers v. Rogers*, 4 Paige, 516; *Morgan v. Patton*, 17 Hun, 403; *Goodwin v. Goodwin*, 4 Day, 343; *Pillow v. Wade*, 31 Ark. 678; *Van Order v. Van Order*, 8 Hun, 315; *Kelley v. Case*, 18 Hun, 472; *Wilson v. Wilson*, 1 H. L. Cas. 538, and cases cited; *Gilbert v. Gilbert*, 5 Misc. (N. Y.), 555, and cases cited; *Switzer*

v. Switzer, 26 Grat. 574, 578, and cases cited; *Collins v. Collins*, 93 Am. Dec. 606; *Beach v. Beach*, 2 Hill, 260, 263; *Buttlar v. Buttlar*, 57 N. J. Eq. 645; *Miller v. Miller*, 1 N. J. Eq. 391; *Aspinwall v. Aspinwall*, 49 N. J. Eq. 302; Beach, Mod. Law Cont. § 1544; *Whitney v. Whitney*, 15 Misc. (N. Y.), 72; *Hungerford v. Hungerford*, 16 App. Div. 614; *Poillon v. Poillon*, 29 Misc. 666; *Simpson v. Simpson*, 4 Dana, 140, 143; *Stokes v. Anderson*, 118 Ind. 533, 4 L. R. A. 313, 321; *Henderson v. Henderson*, 48 L. R. A. 766; *Friedman v. Bierman*, 43 Hun, 387; *Helms v. Franciscus*, 2 Bland, Ch. 544, 20 Am. Dec. 402; *Jenne v. Marble*, 37 Mich. 319; *Head v. Head*, 3 Atk. 547; *Worrall v. Jacob*, 3 Merivale, 268. Courts have universally held, under statutes similar to ours, that a contract for separation to be valid must be made through a trustee. *Whitney v. Whitney*, 15 Misc. (N. Y.), 72; *Simpson v. Simpson*, 4 Dana, 140; *Beach v. Beach*, 2 Hill, 260; *Cropsey v. McKinney*, 30 Barb. 47, 56; *Calkins v. Long*, 22 Barb. 97; *Houghton v. Milburn*, 54 Wis. 554; *Galusha v. Galusha*, 138 N. Y. 272; *Daniels v. Benedict*, 97 Fed. Rep. 367; *Hughes v. Cuming*, 36 App. Div. 302; *Fox v. Davis*, 113 Mass. 255; *Stephenson v. Osborne*, 41 Miss. 119; *Tallinger v. Mandeville*, 48 Hun, 152; *Wilson v. Wilson*, 1 H. L. Cas. 538; Schouler, Husband & Wife, § 483; Waterman, Specific Performance, § 42; *Switzer v. Switzer*, 26 Grat. 574; 2 Story, Eq. Jur. § 1428, and cases cited; *Rogers v. Rogers*, 4 Paige, 516; *Helms v. Franciscus*, 2 Bland, Ch. 544; *Poillon v. Poillon*, 29 Misc. (N. Y.), 666, and cases cited; *S. C.* 49 App. Div. 341.

For the respondent there was a brief by *Bloodgood, Kemper & Bloodgood*, and oral argument by *J. B. Kemper*.

BARDEEN, J. Counsel for the respondent have relieved us of any doubt as to the ultimate purpose of this action. In their brief they say, "This is an action to reform a contract already made so that it will express the true meaning and

intent of the parties, which, by mistake and inadvertence, it failed to do." The contract set out in the complaint is an oral one between wife and husband, to live separate and apart. The wife agrees to nothing beyond the mere fact of separation. As a part of said agreement, the husband agrees to contribute money for the support of his wife and children. This he was legally bound to do without any agreement. Another part of the husband's agreement was to make an absolute and unconditional assignment of certain insurance policies on his life. This, it appears, he has failed to do, and it is this part of the agreement which is sought to be enforced in this action. Although not distinctly so alleged, the plain inference is that the parties were then living together as man and wife. The question is fairly presented for the first time in this court whether, under the circumstances stated, an oral contract between husband and wife, without the intervention of a trustee, to separate and live apart, will be enforced.

An attempt is made to separate the agreement to assign the insurance policies from the other branches of the contract; the theory being that because sec. 2347, Stats. 1898, permits a husband to assign a policy of insurance to his wife, the imperfect execution of such assignment may be corrected and enforced in a suit by the wife. This statute, however, has no application to the question. We must go back to the original contract. On the one side, the wife's only agreement is to separate and live apart from her husband. In consideration thereof the husband agrees to contribute to her support and the support of their children, and to assign the insurance policies by an absolute assignment. He fails to carry out this agreement. Will it be enforced? In opposition to its enforcement it is said that it is without consideration and is void as against public policy.

No similar question has been decisively considered by this court. The nearest approach to it is the case of *Rolette v.*

Rolette, 1 Pin. 370, which was an action brought by the husband against his wife and the trustee mutually chosen, to set aside the deed of separation and a bond and mortgage to secure it given by the husband to the trustee. The latter contained provisions requiring the husband to pay the wife an annuity quarterly. The husband claimed that the deed, bond, and mortgage were without any sufficient consideration, and were void as being contrary to the policy of the law in relation to marriage, and against the interest, order, and happiness of society. The complaint showed that the parties had been living apart for some time when the deed and other papers were executed. In discussing the situation the court used the following language: "The deed herein set forth is not a deed for the separation of the plaintiff and his wife, and which, as such, would have been obnoxious to many of the authorities cited by the counsel for the complainant, but is a deed for the separate maintenance of the wife, made and entered into many years after the separation had taken place." The ultimate conclusion was that deeds of this kind were allowable and would be sustained by the court. This decision simply goes to the extent of holding that after a separation has taken place the court will uphold a written agreement of separation and for the wife's support, when made through the intervention of a trustee.

When we come to consider the literature on this subject and review the multitude of cases in which it has been considered, we are struck at once with the lack of harmony of opinion, and with the diversity of decisions. This may be accounted for in a measure by the want of uniformity in the laws regulating the marriage status. In England the unwritten law did not permit the courts to dissolve a marriage or separate the parties on their consent or by confession of one of them. An act of Parliament carefully pointed out for what causes separations might judicially be permitted.

Yet, by what Mr. Bishop terms as "one of the most marvelous judicial somersaults ever witnessed in any country," the English courts now permit the parties to mutually agree to a separation either identical with or differing from the judicial one, as they may prefer, proceeding on a cause which the law allows or forbids, or on no cause, and will enforce specific performance. 1 Bishop, Marriage, Div. & Sep. §§ 1263, 1264. The binding nature of this sort of bargains seems to have been placed upon the ground that the law gave the wife the power to bring, to defend, and to settle divorce suits, and therefore she can make an agreement whereby such a suit is avoided. This seems to be in utter defiance of the law which has existed from the earliest times, forbidding the courts from upholding or sanctioning separation, *in pais* or in court, except upon proof of grounds legally defined and declared sufficient. This change of law is justified upon the ground that public opinion had changed as to the question of public policy involved, and which was by the judges considered a sufficient justification for them to change the law. *Besant v. Wood*, 12 Ch. Div. 605–620. In this country such a complete overturning of settled rules can never be justified, except in obedience to legislative enactment. Our ideas of "public policy" are such as may be gathered from the constitution and the laws and the course of administration and decision. When the will of the people has become crystallized into legislative enactment, and a given subject has been surrounded by regulations, limitations, and restrictions, the courts are bound to consider them as indicating a definite policy, and to yield obedience thereto. In the practical administration of justice the expressed will of the people overrides and controls the individual opinions of judges, and finds expression in decisions in harmony therewith. Any other course would be revolutionary and in opposition to the spirit of our form of government.

In the different states the laws regulating the marriage

status are so diverse that, before giving credit or weight to a judicial decision thereunder, it becomes quite essential to ascertain the legislative policy which finds expression in the laws enacted. Hence the citation of decisions from other states is of no helpful value unless it can be said that their legal policy is in harmony with our own. In England in former times, and in most of the states, as well as our own, the doctrine is recognized that there are always three parties to a marriage contract,— the husband, the wife, and the state. The reason is that the state has a special interest in each individual marriage, and permits its dissolution only in those circumstances and cases wherein it deems the public interest will not be thereby impaired. 1 Bishop, Marriage, Div. & Sep. § 72. By reason of this special interest, stringent laws have been enacted, prescribing the terms and conditions upon which a marriage may be contracted, and regulating with equal strictness the means and grounds of its dissolution. *Prima facie*, therefore, each particular marriage is beneficial to the public, each divorce prejudicial. From this arises the rule of law that agreements promotive of marriage are valid, and those in aid of separation and divorce are void. There can never be a divorce by agreement or consent of parties. Without dissent, the courts unite in condemning all applications for a dissolution of a marriage where there is a suggestion of collusion. In harmony with the idea that circumstances might arise during cohabitation rendering it unfit or impossible for the parties to continue together in the close relation of man and wife, the legislature has seen fit to mention certain grounds upon which a separation from bed and board may be adjudged. With the wisdom of this legislation we are not concerned. We must accept it as the will of the people, and administer it according to its spirit and letter. The fact that such legislation is to be found on our statute books is a strong reason for saying that it was the legislative purpose that only such separation shall be recog-

nized as has received judicial sanction. It being universally conceded that an absolute divorce will not be granted upon consent or agreement of the parties, there would seem to be equally as strong reason for holding that an agreement for separation, which is the equivalent of a limited divorce, should not be recognized. In other words, it is for the courts, and not the parties, to determine whether proper grounds for a separation exist or not. To uphold such agreements substitutes the will of the parties for the judgment of the judicial tribunal established by law to decide such questions. We need not turn to other states for precedents. The question turns upon the legal policy of this state, as evidenced by legislative enactments. An agreement for voluntary separation is distinctly against such policy, and for that reason must be held to be absolutely void.

The agreement in question was oral, and but partially executed. The usual form of such bargains is by a deed between the husband, the wife, and a third person acting as her trustee. 1 Bishop, Marriage, Div. & Sep. § 1286. We need not inquire whether under our statute the intervention of a trustee is necessary or not. Admitting, as has been in held in some jurisdictions (*Dutton v. Dutton*, 30 Ind. 452), that a parol agreement fully executed would be recognized in equity, still that rule does not apply here. This action is to enforce the specific performance of a portion of the original agreement,— an agreement having no consideration, so far as the husband is concerned, farther than a present covenant on the part of the wife to separate. Such an agreement, we must hold, is contrary to the legal policy of this state, and will not be enforced. It implied a direct renunciation of stipulated duties,— a dereliction of those mutual offices which the parties are not at liberty to desert by agreement between themselves. It substituted the will of the parties for the judgment of the court, and involved the assumption of a false character in both parties, contrary to

the marriage contract and subversive of the interests of society. The reason given by the chancellor in *Rogers v. Rogers*, 4 Paige, 516, meets our approval, when applied to the case before us. When an agreement has been made after separation in such a way that it may be enforced, as in the *Rolette Case*, 1 Pin. 370, the law tolerates it, but will not regard it with favor.

The assertion that this is a suit regarding the separate property of the wife cannot be recognized. It affirmatively appears in the complaint that she had no property, but was dependent upon her own exertions and the help of relatives. It is to make these insurance policies a part of her separate property that this suit is brought. To do so, she must revert to the original contract, which, as we have seen, has no binding force.

By the Court.— The order of the circuit court is reversed, and the cause is remanded with directions to sustain the demurrer, and for further proceedings according to law.

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109 56
112 [1]644

THE STATE EX REL. HELLER, Appellant, vs. FULDNER, Clerk, etc., Respondent.

January 9 — February 1, 1901.

(1) Certiorari: *Conclusiveness of return.* (2) *Taxation: Board of review: Reduction of valuation.*

1. A return to a writ of *certiorari* imports complete and absolute verity so far as it is responsive to the writ; and neither the allegations of the petition nor of the writ can serve to supply other facts merely because they are not traversed or otherwise met by the return.
2. Where no evidence under oath is given or offered before the board of review upon an application to reduce an assessment, the board has no power to reduce the valuation.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This was a writ of *certiorari* to review the action of the board of review of the town of Greenfield, Milwaukee county, at their regular meeting in July, 1897, in refusing to lower the valuation of certain property of the relator. From the return it appeared that such application was made and was accompanied by a statement from the relator of a comparison between the values of his premises and others, asserting a relative overvaluation, but that no sworn testimony was given or offered upon the hearing, and that the relator made no request to be sworn in giving his statement. The application was denied. From judgment quashing the writ relator brings this appeal.

Geo. L. Williams, for the appellant.

For the respondent there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas* and *Henderson & Williams*, and oral argument by *F. W. Henderson* and *J. G. Flanders*.

DODGE, J. Notwithstanding the settlement of a bill of exceptions purporting to show what transpired at the hearing when the order quashing the writ was made, there still exists considerable uncertainty and confusion about the grounds on which the court made that order. Apparently, however, the action was predicated on facts arising subsequent to the return; such as that the same assessment had in another action been declared void, and a reassessment been ordered, and that the assessment roll had, long before the hearing, passed out of the possession of the respondent, the town clerk, or perhaps because of the pendency of another action rendering unnecessary the *certiorari* proceeding. An inspection of the return, however, renders it unnecessary to disentangle the somewhat confused transactions which led the court, in the exercise of his discretion, to order the writ quashed. That, of course, cannot prejudice the relator, if it appears by the return that judgment of affirmance should have been entered. *State ex rel. Gray v. Common Council of*

Oconomowoc, 104 Wis. 622, 628; *State ex rel. Cameron v. Roberts*, 87 Wis. 292, 296. The facts to which the court must apply the law in reaching a judgment on the merits in *certiorari* proceedings must be found in the return. When that comes in, it imports absolute and complete verity, so far as it is responsive to the writ; and neither the allegations of the petition nor of the writ can serve to supply other facts merely because they are not traversed or otherwise met by the return. *State ex rel. Heller v. Lawler*, 103 Wis. 460, 464. From the return it appears that no evidence under oath was given or offered before the board of review upon the relator's application to reduce his assessment. In the absence of such evidence, the board had no power to reduce the valuation, and their refusal to do so cannot, therefore, have constituted a breach of their duty or an excess of their jurisdiction. *State ex rel. Giroux v. Lien*, 108 Wis. 316. This view is conclusive against reversal of the action of the board of review which the relator assails. Had the writ not been quashed, and had the merits been considered, no relief could have been accorded him. He is, therefore, not prejudiced by the judgment quashing the writ, and, whether such judgment was right or wrong, it should not be reversed on appeal.

By the Court.— Judgment affirmed.

109	58
112	*308
109	58
114	*484

SHEPPARD, Respondent, vs. ROSENKRANS, Appellant.

January 11—February 1, 1901.

(1, 2) *Landlord and tenant: Privilege of extending term: Statute of frauds: Notice: Waiver.* (3, 4) *Instructions to jury: Special verdict: Appeal: Exceptions.*

1. A lease for a certain term, "with the privilege of four years more . . . by giving ninety days' notice" before the expiration of the original term, is an unconditional lease for the first period and a

conditional lease for the four years thereafter, and if the notice is given the lessee holds for the additional term under the original lease and not under the notice. The notice is therefore not within the statute of frauds of Illinois (sec. 2, ch. 59, Starr & C. Ann. Stats. Ill. 1896), and may be given by an agent having no written authority.

2. In such a case acceptance of a notice not seasonably given, and action thereon without objection, constitute a waiver of the condition as to the time of giving the notice.

3. It is error for the trial court to state to the jury the legal effect of their answer to a question in the special verdict.

4. An omnibus exception to an instruction to the jury which includes several distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly.

APPEAL from a judgment of the circuit court for Milwaukee county: D. H. JOHNSON, Circuit Judge. *Affirmed.*

This is an action to recover certain instalments of rent under a written lease. The action was tried by a jury, and it appeared, among other things, upon the trial, that on the 25th of September, 1894, one Jacob Weil, of Chicago, Illinois, and the defendant, *O. L. Rosenkrans*, entered into a written lease, which was signed and sealed by both of them, by the terms of which Weil leased to *Rosenkrans* room No. 206 in a building known as the "Garden City Block," in the city of Chicago, Illinois, "from the first day of October, 1894, to the 30th day of April, 1896, with the privilege of four years more at the rate of $40.00 per month for the first year, and $50.00 per month for the remaining three years, by giving ninety days' notice before the 1st day of May, 1896, for the sum of seven hundred and sixty dollars, payable in monthly instalments of forty dollars in advance on the first day of each and every month during the term of this lease, at the office of Jacob Weil & Co., in Chicago, Ill."

The defendant, *Rosenkrans*, went into possession of the premises, and used the same for the transaction of a jewelry business, and paid the rent in monthly instalments, as pro-

vided by the terms of the lease. On the 1st day of March, 1896, it appears that a corporation called the Weber Jewelry Company succeeded to the business of *Mr. Rosenkrans*, and occupied the premises until the 1st day of August, 1897. *Mr. Rosenkrans* seems to have been the manager of the business of the Weber Jewelry Company, and largely interested therein, and kept the bank account thereof in his own name. The Weber Jewelry Company paid rent for the premises at $40 per month up to the 1st day of May, 1897, and at $50 per month for the months of May, June, and July, 1897. On the 3d of March, 1896, the following written notice was delivered by one J. H. Weber to Joseph S. Meyers, at Chicago, Illinois, who was a member of the firm of Jacob Weil & Co., and was the agent of Mr. Weil in this transaction: "Chicago, March 3d, 1896. *Jacob Weil, Esq.* Dear Sir: This is to notify you that I will continue the lease of room 206 in Garden City Block as per stipulation in said lease. Yours very truly, *O. L. Rosenkrans*, by J. H. Weber." J. H. Weber was a member of the corporation known as the Weber Jewelry Company, and was the cashier and general clerk thereof, and testified that he gave this notice by direction and authority of *Mr. Rosenkrans;* but the defendant denied that he had authorized the giving of any such notice. On the 28th day of May, 1897, Jacob Weil assigned the lease in question to the plaintiff, *R. D. Sheppard*, by written assignment indorsed upon the lease as follows: "In consideration of one dollar to me in hand paid, I hereby transfer, assign, and set over to *R. D. Sheppard* and assigns my interest in the within lease, and the rent thereby secured. Witness my hand and seal this 28th day of May, 1897. Jacob Weil. [Seal.]" Jacob Weil died December 17, 1897.

The following special verdict was rendered by the jury: "(1) Did Jacob Weil, then in his lifetime, but since deceased, and the defendant, *O. L. Rosenkrans*, make and enter into the lease in evidence, dated September 25, 1894? (By direc-

tion of the court.) They did. (2) Did the defendant during the ninety days prior to May 1, 1896, to wit, on the 3d day of March, 1896, serve or cause to be served upon the agent of the then owner of the demised premises a notice that he, the defendant, would continue in the possession of said premises under said lease and the provision therein for the renewal thereof, four years after the expiration of the original lease, to wit, April 30, 1896? Yes. (3) Was the said lease duly assigned by the lessor, Jacob Weil, then in his lifetime, but since deceased, to the plaintiff in this action, *Robert D. Sheppard*, May 28, 1897? Yes. (4) Did the defendant vacate said premises July 31, 1897? Yes. (5) Did the plaintiff obtain a new tenant for said premises May 1, 1898? Yes. (6) Before obtaining said tenant, did the plaintiff use reasonable diligence to rent the said premises for the best price that could be obtained? Yes. (7) Were said premises vacant during nine months? Yes. (7½) After the alleged renewal of the lease, down to the time when said premises were vacated, did the defendant occupy said premises under said lease, or were said premises occupied by the Weber Jewelry Company under some arrangement or bargain made by them with Jacob Weil, since deceased? *O. L. Rosenkrans* occupied premises under said lease. (8) Did the new tenant for said premises pay to the plaintiff rent for said premises at the rate of $35 per month from his entry therein down to the time of the commencement of this suit, January 3, 1899, and was $35 a month the highest rent that the plaintiff could obtain therefor? Yes. (9) If the court should be of the opinion that the plaintiff is entitled to judgment, in what sum do you assess his damages? $616.52."

Judgment for the plaintiff was rendered upon the verdict, and the defendant appeals.

For the appellant there were briefs by *Blatchley & Burke*, and oral argument by *A. H. Blatchley*.

For the respondent there was a brief by *O'Connor, Hammel & Schmitz*, and oral argument by *Leopold Hammel*. They argued, among other things, that when a tenant, by the terms of a lease, has an option or privilege to remain for a longer period, such additional term is not a new demise, but a continuation of the old one. It is extended by the provisions of the covenant contained in the lease itself, and becomes a lease for the additional term. *Kramer v. Cook*, 7 Gray, 550; *Delashman v. Berry*, 20 Mich. 292, 298; *Insurance & Law B. Co. v. Nat. Bank of Mo.* 71 Mo. 60; *Orton v. Noonan*, 27 Wis. 272; *Noonan v. Orton*, 27 Wis. 300; *Kimball v. Cross*, 136 Mass. 300; *Ranlet v. Cook*, 44 N. H. 512; *Clarke v. Merrill*, 51 N. H. 415; *Brown v. Parsons*, 22 Mich. 24.

WINSLOW, J. The lease in question was an Illinois contract, and the appellant's main contentions are based upon the provisions of that part of the statute of frauds of Illinois relating to contracts concerning lands or interests therein which reads as follows: "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some person thereunto by him lawfully authorized in writing signed by such party." Sec. 2, ch. 59, Starr & C. Ann. Stats. Ill. 1896.

The appellant's argument is that the occupation of the premises after April 30, 1896, must be a holding under the notice of election to hold for the additional term, and that such notice having been given by an agent whose authority, if any, was not in writing signed by *Rosenkrans*, it follows that the notice was inadmissible in evidence, and ineffective even if admitted. The conclusive answer to this conten-

tion, as well as to the minor contentions founded on the statute referred to, is that, if the option provided for in the lease was exercised, the lease became a lease for both the original and the extended terms, and hence the holding was under the original lease and not under the notice. As said in 1 McAdam, Landlord & T. (3d ed.), 160: "A lease for one year, or three additional years if the lessee elect, is of itself a lease for four years if the lessee elect to continue it beyond the first year. This is so because, if the tenant makes the election, he still holds under the original demise; there is no further act to be done by the lessor."

The stipulation was not to "renew" or "extend" the lease, which stipulation would require the making of a new lease (*Kollock v. Scribner*, 98 Wis. 104), but it was a stipulation that by the giving of a certain notice the lease itself should cover an additional four years. It was an unconditional lease for the period expiring April 30, 1896, and a conditional lease for four years thereafter. The condition was the giving of a certain notice by the lessee, but it might just as well have been the happening of an event over which neither party had control, such as the death of a person or the falling of a tree. When such required event happened, the condition was satisfied, and the lease became a lease for the additional period by its own terms. The act of the lessee in giving the notice was not the making of an agreement, but the performance of a condition upon which the previously made agreement depended. So the statute referred to does not apply to the notice of the exercise of the option or privilege, and the authority of the agent to make it is not required to be in writing.

But it is said that the notice was not given ninety days before the 30th day of April, 1896, and hence that the condition never was in fact performed. This objection, however, is met by the fact that the notice was given and accepted without objection on the score of time. There are

few cases where the time within which an act is required to be done may not be waived by the parties where the rights of others are not affected, and the facts in the present case show an undoubted waiver by acceptance and action upon the notice without objection.

An exception to a portion of the charge requires notice. In charging the jury upon interrogatory 7½, the trial judge gave an instruction covering nearly a page and a half of the printed case. The first part of the instruction, nearly a page in length, was substantially a correct statement of the considerations which the jury might take into account in answering the question. Then followed, however, this clause: "Although it is not my duty to tell you the effect of your answer, I may state that, if you answer that it was occupied by the Weber Jewelry Company under an arrangement or bargain made with Mr. Weil, it will relieve *Mr. Rosenkrans* of any liability, because the occupation which continued after the renewal of this lease was all paid for." The defendant excepted to the entire instruction. The court undoubtedly committed error in stating to the jury the legal effect of their answer to the question upon the rights of the parties, under numerous recent decisions of this court; and, had exception been taken specifically to this part of the charge, we should feel obliged to reverse the case. The rule is familiar, however, that an omnibus exception which includes two or more distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly, and under this rule we cannot consider the exception.

Other minor errors are assigned, but we find no merit in them, and they do not require specific treatment.

By the Court.— Judgment affirmed.

THE BECK & PAULI LITHOGRAPHING COMPANY, Appellant, vs. NEBRASKA CITY CEREAL MILLS, Respondent.

January 11—February 1, 1901.

Contracts: Evidence.

In an action to recover damages for breach of a contract to purchase show cards to be used as advertising matter, it appeared that, after some work upon the design for the cards had been done and approved, the defendant corporation had succeeded to the business of the partnership which had agreed to purchase the cards; that the president of the corporation, upon being shown the correspondence with the partnership and the sketches and proofs of the cards, stated to plaintiff's agent that not later than the next spring he would "take up the matter of the show card proposition and use them at that time;" and that plaintiff did nothing further on the cards until spring, when it opened up negotiations with defendant, but the latter then refused to recognize any liability to plaintiff. *Held*, that no contract between plaintiff and defendant was shown.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

Action for damages for breach of contract. The facts alleged for plaintiff's cause of action, omitting mere formal matters, are as follows: December 24, 1890, the firm of F. Byschlag & Son, composed of Theodore and Frederick Byschlag, who were engaged in manufacturing and dealing in cereal food products, received from plaintiff a written proposition relating to the purchase of stationery and advertising material, which was in the following words:

"Nebraska City, Neb., Dec. 24, 1890.

"*Nebraska City Cereal Mills.*

"Gents: We will submit sketch for new trademark for show card, and after sketches and finished proofs have been submitted we will furnish you 10 M. each of the different kinds of headings, viz., letter heads 8½x11, 8½x5½, note heads, bills, ½, ¼, ⅛, ¼, business cards and 2 M. drafts. We will also submit sketch for a new hanger embodying trademark in col's, stationery to be made in three col's, viz., gold, red,

and black, stationery at $9.50 per M., show cards at 17½c. each, f. o. b. Milwaukee. Work all executed in firstclass style, and we will attend to the registration of trademark.

"Very truly,
"THE BECK & PAULI L. Co.,
"per C. J. Smith."

Such proposition was addressed to F. Byschlag & Son as the Cereal Mills Company, and was duly accepted in writing. The contract thus made was carried out as regards the stationery. The defendant corporation was subsequently formed to acquire and carry on the business of F. Byschlag & Co., and the object thereof was consummated, such corporation succeeding to all the business of the company and assuming and agreeing to carry out all of its existing contracts, including that with plaintiff. Prior to the said assumption a pencil design for the show-card hanger mentioned in the contract was made by plaintiff, submitted to F. Byschlag & Co., and approved by them. Thereafter further work was done in carrying out the contract by plaintiff preliminary to the work of printing the show-card hangers, such work being duly approved, no business in that regard, however, being done subsequent to the formation of the corporation. On August 22, 1895, and after the formation of the corporation, it was mutually agreed between plaintiff and defendant that the obligation of the contract on the part of F. Byschlag & Co. should be carried out by defendant, with the understanding, however, that it should not be required to take the show cards till the winter of 1895-96. Thereafter defendant refused to recognize liability under such contract, to plaintiff's damage in the sum of $1,032.

The defendant answered by a general denial.

On the trial there was a failure of evidence tending to show an agreement between F. Byschlag & Co. and defendant obligating the latter to carry out the contract with plaintiff. The only evidence relied on to show that there was such an agreement made between plaintiff and defend-

ant was that of plaintiff's agent, who testified that he interviewed Frederick Byschlag, president of defendant, on the subject; that such president was the father of the Byschlag who acted for the firm at the time the contract was made with it; that the son was dead; that on such occasion the agent had with him the correspondence that had passed between plaintiff and F. Byschlag & Co., and the sketches and proofs that had been submitted and approved as aforesaid; that the correspondence and approved work were exhibited to the president; that he acknowledged the genuineness of his son's signature to the contract, but said that defendant must use up the advertising material on hand before it went further in that line; that not later than the next spring he would "*take up the matter of the show-card proposition and use them at that time.*" There was no evidence that plaintiff did anything thereafter, towards getting out the show cards ready for delivery, on the faith of a contract with defendant. The evidence shows that, before the time came for further negotiations between the parties in accordance with Mr. Frederick Byschlag's suggestion that the matter would be taken up not later than the following spring, he died; that his successor in the management of defendant's affairs refused to recognize any liability of it to plaintiff. There was undisputed evidence as to the amount of plaintiff's recoverable damages if defendant is bound as alleged.

The jury found specially that at the time of the interview between plaintiff's agent and Frederick Byschlag, the latter did not, on behalf of defendant, assume and agree to carry out the contract of F. Byschlag & Co. Judgment was thereupon entered in defendant's favor, and plaintiff appealed.

For the appellant there was a brief by *Tarrant, Kronshage, McGovern & Dielmann*, and oral argument by *W. D. Tarrant.*

For the respondent there was a brief by *A. G. Weissert*, attorney, and *Frank B. Van Valkenburgh*, of counsel, and oral argument by *Mr. Van Valkenburgh.*

MARSHALL, J. As we view the case it is needless to consider the numerous errors assigned by appellant's counsel. It is conceded by them that defendant is not liable unless it assumed and agreed to carry out the contract made with F. Byschlag & Son. There was no pretense on the oral argument that there is any evidence to that effect unless it be that of plaintiff's agent to the effect that defendant's president said to the former that not later than the coming spring he would "*take up the subject of the show-card proposition and use them at that time*," referring, evidently, to the designs for the show cards that were present when the statement was made. We are unable to discover anything in that evidence to indicate the making of a contract. It shows clearly that Frederick Byschlag did not intend to even discuss, at the time of the interview, the subject of making a contract. The words upon which appellant's counsel rely, "use them at that time," plainly did not mean use the show cards, but use the designs and approved sketches which the agent had exhibited in considering the subject of adopting the method of advertising contemplated by the old show-card contract, and making a new contract to that end. That seems to be the only sensible meaning of what was said to plaintiff's agent, and, so far as appears, plaintiff so understood it. There is nothing in the evidence as to what occurred after the interview, to create even a suspicion that plaintiff supposed it was to go on and get out the advertising material ready for delivery to defendant not later than spring. On the contrary, its attitude was that of waiting till spring to further negotiate in regard to making a contract with defendant, in accordance with the fair meaning of the language used to plaintiff's agent. At the close of the evidence the court should have dismissed the action because of an entire failure of proof of facts sufficient to charge defendant.

By the Court.—The judgment is affirmed.

GUHL, Respondent, vs. WHITCOMB and another, Appellants.

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f112 2 32
109 69
117 2 38

January 12 — February 1, 1901.

Railroads: Injury to traveler at highway crossing: Duty to look and listen: "Diversion of attention:" Evidence: Photographs of nude person.

1. The known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. A remark to the contrary in *Ward v. C., St. P., M. & O. R. Co.* 85 Wis. 601, overruled.
2. "Diversion of attention" will not justify a failure to look and listen at a highway crossing, except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. The duty to look and listen is absolute *where the opportunity exists.*
3. Plaintiff, a girl nineteen years old, riding northward on a bicycle on a highway which crossed a railway track at an angle of only sixteen degrees, dismounted at a point 105 feet from the crossing and about on a line with the right-of-way fence, looked to the south, in which direction her view was unobstructed for at least 800 feet, and then proceeded slowly on foot, without again looking south, until she reached the crossing, where she was struck by a train from that direction. While approaching the track she had noticed a train about 2,000 feet to the northward, which she thought was approaching slowly, but her view of that train was again obstructed until she was within a few feet of the crossing. She could not see the sidetrack upon which such train was in fact standing, and did not know of its existence, although she lived a short distance away. *Held*, that she was negligent in omitting to look for a train from the south.
4. The admission in evidence of photographs showing rear views of the person of the plaintiff, a young lady, nude from below the shoulders to mid-thigh, was grossly improper. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

Action for personal injuries received by plaintiff about five miles south of Oshkosh, at a crossing of a north and south highway with the Wisconsin Central Railroad, which at that point ran so nearly north and south that the angle of crossing was only sixteen degrees. Plaintiff, a girl nineteen years of age, resided with her father about a quarter of a mile south of the crossing, and between the highway and the track. On the 28th of March, 1896, she started from her father's house northward on her bicycle, and rode to the crossing of an east and west highway about half way to the railroad crossing, where she dismounted to cross a mud puddle. She then looked to the eastward and southward towards the track, of which she could see about a quarter of a mile south of the crossing. She mounted her wheel, and proceeded to a point in the highway 105 feet south of the crossing, which point was about thirty feet due west of the track and about on a line with the right-of-way fences. Approaching this point, she had noticed a train to the northward, a long way off, which at this point was obscured by fences and elevation in the ground, though she could still see the smoke. At this point she dismounted and looked southward. The amount of the track south of the crossing within her vision is variously estimated at from 800 feet to eighty rods. She then proceeded on foot, slowly, looking continuously to the northward, her vision of the train in that direction being obscured by the cattle-guard fences until she reached a point a few feet from the track, when she saw a freight train to the northward, which was in fact stationary and something more than 2,000 feet away, but which she thought was moving slowly towards her. Without looking to the southward, she proceeded slowly to and onto the track, at which moment she was struck by a regular passenger train then due, running at a high rate of speed northward. At any point within the last fifty feet of her course before reaching the railroad track her vision

of the track to the southward was unobscured substantially as far as the eye could reach, but at no point subsequent to that 105 feet away had she looked to the southward. She heard the rumble of a train, which she took to be the freight train to the northward of her. There was evidence of failure on the part of defendants' employees to give the requisite signals by whistle or bell.

The court instructed the jury, among other things, that "the duty of a traveler before crossing a railway to look both ways and listen depends upon the conditions that he might reasonably expect the coming of a train at any and all times, and that his attention is not reasonably arrested or diverted;" and that they must determine whether it was "ordinary care and prudence on the part of the plaintiff to fail to look to the south and see this train approaching, when her attention was taken up by watching the train which was coming from the north."

A general verdict was rendered for the plaintiff against defendants' motion to direct one for the defendants, which the court refused to set aside upon motion, and entered judgment for the plaintiff, from which the defendants appeal.

For the appellants there was a brief by *Howard Morris* and *Thos. H. Gill*, and oral argument by *Chas. M. Morris*.

For the respondent there was a brief by *Earl P. Finch* and *Fred. Beglinger*, and oral argument by *Mr. Beglinger*.

DODGE, J. The two principal errors assigned consist in the denial of motion to direct a verdict on the ground of plaintiff's contributory negligence, and in the giving as a rule of law to the jury the sentence quoted in the statement of facts, together with some other instructions further developing the same idea. That sentence is adopted from the opinion in *Ward v. C., St. P., M. & O. R. Co.* 85 Wis. 601, 604, and, unless later decisions of this court have modified

that case, the instruction assailed is not unsupported by authority. A review of the subsequent cases, therefore, becomes necessary.

It will be observed that the instruction under consideration exempts a traveler from the absolute duty to look and listen in the absence of either of two conditions: first, that the situation is such that he may reasonably expect the coming of a train at any and all times; and, second, that his attention is not reasonably arrested or diverted. The first of these exceptions to the rule of duty to look and listen, namely, that the situation must be such that one may reasonably expect a train to pass, was repudiated within a year after the decision of the *Ward Case* in *McKinney v. C. & N. W. R. Co.* 87 Wis. 284, under circumstances more strongly inviting its recognition. In the *Ward Case* the exception was predicated on the fact that a train had just passed and plaintiff failed to look and see a loose car following it. In the *McKinney Case* two trains had passed, and plaintiff failed to look and see a third, following more closely than customary and than permitted by rules of the company. Under those circumstances it was said, "The track itself is a danger signal." In his dissenting opinion Mr. Justice WINSLOW pointed out that the decision in substance overruled the *Ward Case.* Again, in *Schlimgen v. C., M. & St. P. R. Co.* 90 Wis. 186, 193, was excluded the possibility of legitimate inference that under any circumstances a railway track is safe; the court saying, "A railroad track is, in effect, a standing proclamation to those approaching it that cars are liable to run thereon at any time." In *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16, 26, the above language was quoted and applied where plaintiff had observed that the train headed west, which injured him, was stationary at the depot, 200 feet away, engaged in loading freight, and his attention was engaged in looking for a train due from the west.

In *McCadden v. Abbot*, 92 Wis. 551, plaintiff, a fireman,

observing the engine which injured him, stationary, taking on coal, went a short distance and crossed the track without looking, and was run down because the engine traveled fifteen miles per hour, whereas if it had pursued the custom, known to plaintiff, of traveling only six miles per hour in that part of the yard, he would have been in no peril. In this situation it was reiterated that the track was a standing proclamation of danger, and that failure to look by one having the opportunity was of itself contributory negligence and precluded recovery. There was cited with approval *Nixon v. C., R. I. & P. R. Co.* 84 Iowa, 331, to the effect that knowledge of a custom to run trains in only one direction on the particular track was no excuse for failure to look both ways. In *White v. C. & N. W. R. Co.* 102 Wis. 489, it was held that absence of usual warning by gates was no excuse to a foot passenger for omission to look, when he had the opportunity, before stepping on the track.

From these later decisions we think it should have been apparent to the trial court that the somewhat *obiter* remark in the *Ward Case* that the duty of one to look and listen "depends on the condition that he might reasonably expect the coming of a train at any and all times" is entirely abrogated. In nearly all of the cases above quoted the *Ward Case* was urged upon the attention of the court. It is, perhaps, unfortunate that it was not mentioned by name in some of the opinions and the implied repudiation of some of its doctrine made explicit. However, in view of the cases above mentioned, it cannot be doubted that the rule of this court, now settled too firmly to permit question, is that the known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. Observation, not logic, is the proper precaution.

The instruction of the court—adopted, as we have said, from the *Ward Case*—that, if a traveler's attention is "reasonably arrested or diverted," his duty to look and listen is abrogated, involves a misleading use of terms. "Diversion of attention" had long before been adopted to express conditions under which the watchfulness of one traveling on a sidewalk might be relaxed, consistently with ordinary care. The expression had thus acquired a meaning in the law which obviously renders it inapplicable to the duty of vigilance resting on one about to cross a railway track, which is not, like a city sidewalk, an assurance of probable safety, but, on the contrary, a proclamation of peril. The expression was used (casually, it is true) in *Piper v. C., M. & St. P. R. Co.* 77 Wis. 247, but there it was applied to a situation where the plaintiff's attention was irresistibly withdrawn from an approaching train by attempted runaway of his team. The expression having again been used in the *Ward Case*, and both cases being pressed on this court in *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 386, the present chief justice took occasion to point out that in his use of terms in the *Piper Case* he applied the expression to an absolute *forcing* away of the attention. That term was again used to express the situation which might excuse momentary relaxation of watchfulness in *Koester v. C. & N. W. R. Co.* 106 Wis. 460, 469. In numerous other cases circumstances which might well satisfy the expression "diversion of attention" have been held insufficient to excuse a failure to continually look and listen. *Lofdahl v. M., St. P. & S. S. M. R. Co.* 88 Wis. 421; *McKinney v. C. & N. W. R. Co.* 87 Wis. 284; *Schlimgen v. C., M. & St. P. R. Co.* 90 Wis. 186; *Nolan v. M., L. S. & W. R. Co.* 91 Wis. 16; *McCadden v. Abbot*, 92 Wis. 551; *White v. C. & N. W. R. Co.* 102 Wis. 489; *Cawley v. La Crosse City R. Co.* 101 Wis. 145; *Ryan v. La Crosse City R. Co.* 108 Wis. 122; *Wills v. Ashland L., P. & St. R. Co.* 108 Wis. 255.

The rule stated in these decisions is that the duty to look and listen is absolute *where the opportunity exists.* In most of these cases the exception in favor of reasonable diversion of attention was urged, and its applicability was apparent if those words be used in the sense now contended for by respondent. It is considered, therefore, that all exception to the duty to look and listen at a railroad crossing resulting from diversion of attention has been repudiated by this court except in cases where the attention is so irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. This rule is general, and applies as well to the driver of a team as to the foot passenger, with the difference, however, that it is much more difficult to conceive circumstances surrounding the latter which can at once deprive him of the opportunity to observe and the ability to stop short of the actual peril. With him a single step, wholly under his control, crosses the danger line. With the driver, many things may complicate the situation,—momentum, conduct of horses, multiplication of perils, and the like.

In the record before us there is nothing to excuse the conceded omission, while walking a distance of at least fifty feet, to look along the unobscured track to the southward. During most of that distance observation to the north was futile and needless. Plaintiff could not see the train in that direction, and she was in no peril from it till she reached the track. When she did come to a point whence the freight train was in sight, she was still ten or fifteen feet from the track, and the train, moving, as she thought, very slowly, was more than a third of a mile away. It certainly offered no attraction and threatened no peril to preclude her from a glance in the opposite direction. Even had it been so close as to imperil her, nothing prevented her from pausing to give that glance before incurring the other danger, which the existence of the track warned her was imminent and

momentary. The suggestion that the sight of the freight train was an assurance against a train from the south is not of weight. If, as she testifies, she could not see, and did not know of, a sidetrack, she had no right in reason to infer the nonexistence of any. Indeed, the fact that the freight train was substantially stationary at a place remote from the station would suggest a passing point, if she reasoned at all on the subject. These considerations are, however, beside the issue. No process of reasoning could justify her in needlessly stepping onto the track without assuring herself by observation that no train approached from either direction.

We cannot, without violation of settled rules of law, either approve the instruction given to the jury, or recognize any of the circumstances surrounding plaintiff as sufficient to justify the inference or conclusion that she was not negligent in omitting to look for a train from the south, for which precaution she had ample opportunity. Both of the assignments of error are well taken.

2. We cannot pass silently the reception in evidence of photographs showing rear views of plaintiff's person, nude from below the shoulders to mid-thigh. Such photographic exposure of the body of a twenty-year-old girl in a court room full of men is even more grossly improper and shocking than the conduct disclosed in *Brown v. Swineford*, 44 Wis. 282, 285, of which this court expressed its condemnation in the scathing words of Chief Justice RYAN: "No such indecency is ever necessary, or should be tolerated, in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring

it into ridicule, if not into contempt. It is hoped that this court may never have another occasion for such censure." To those words we cannot and need not add, save to reiterate the sentiments they express, and to invoke for them the careful attention of those, whether of court or bar, who may be tempted to repeat such defilement of the proceedings in a court of justice.

By the Court.— Judgment reversed, and cause remanded for a new trial.

MISSISSIPPI RIVER LOGGING COMPANY, Respondent, vs. MILLER and another, Appellants. 109 77 p109 311

January 12 — February 1, 1901.

Conditional sale of standing timber: Title not to pass until payment: Filing contract: Rights of bona fide *purchaser: Estoppel.*

1. A contract for the sale of standing timber, providing that until all payments are made "the title, ownership, possession, and right of possession of said timber, or the lumber manufactured therefrom, wherever the same may be, shall be and remain" in the vendor, is a contract for the sale of an interest in land, and is not affected by sec. 2317, Stats. 1898, requiring the filing of conditional sales of personal property in order to make them valid as against third persons.
2. Such a conditional sale is valid and title remains in the vendor not only as against the vendee but also as against a *bona fide* purchaser from the vendee who has paid for the property without notice of the vendor's claim; but the vendor may, by his acts, be estopped from asserting his title as against such a purchaser.
3. The vendor under such a contract knew that the vendee was engaged in manufacturing and selling lumber, and that the timber conveyed was to be manufactured and sold, but gave immediate possession to the vendee and allowed that possession to be accompanied with all the *indicia* of title and apparent right to sell. He also made extensions of time for the payment of part of the purchase price, at one of which times he had express notice that the vendee was actively engaged in selling lumber. *Held,* that the vendor

was estopped from asserting his right as against a person who had purchased from the vendee in the ordinary course of business, without notice of the vendor's claim, and had paid the full purchase price before receiving any notice thereof.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

This is an action in trover to recover the value of a large quantity of lumber. The plaintiff is an Iowa corporation, and the defendants are a partnership doing business at Chicago, Illinois. The complaint alleges, in substance, that on the 22d of November, 1895, the plaintiff owned a number of sections of timber land (describing the same) in Lincoln county, Wisconsin; that on that day it entered into an agreement with the Illinois & Wisconsin Lumber Company, an Illinois corporation doing a general logging and lumber business at Merrill, Wisconsin, by which it sold all of the pine timber on said lands to said Illinois Company for $12,000, one half thereof to be paid May 1, 1896, and the remainder July 1, 1896, reserving the title and right of possession of said timber in itself until all payments had been made; that said Illinois Company cut 2,500,000 feet, or more, of timber from said lands in the winter of 1895 and 1896, and manufactured the same into lumber at its mill in Merrill, and turned the same over to the defendants, who shipped it out of the state and converted it to their own use; that on May 11, 1896, the Illinois Company paid $6,000 and interest upon said contract, and that on May 14, 1897, the balance due the plaintiff from the Illinois Company on said contract was $4,141.09, which sum is still due; that when the defendants purchased and paid for said lumber they knew the facts above stated as to the rights of the Illinois Company, and that the title and right of possession in said lumber was in the plaintiff, but that the defendants have refused to deliver said lumber to the plaintiff, or pay the plaintiff the balance due thereon, though requested so to do.

The answer, in effect, alleged that the plaintiff had realized enough upon the timber which was left on said lands by the Illinois Company to pay all that was due upon said contract; and, as a further defense, the answer alleged that the defendants purchased said lumber of the Illinois Company in good faith, without any information as to the plaintiff's alleged title, and that the plaintiff is estopped from asserting title to said lumber, because it put no marks thereon, and left the same in undisputed possession and apparent ownership of the Illinois Company, and allowed said Illinois Company to pile the same in its yard and intermix the same with its other lumber, and made no effort to preserve any lien thereon or give any notice to *bona fide* purchasers that said lien was claimed.

Trial by jury was waived. The evidence showed that the Illinois & Wisconsin Lumber Company, in November, 1895, was doing a logging and lumber business in Lincoln county, Wisconsin, and cutting pine timber upon its own lands in said county, and removing the same and manufacturing it into lumber at its sawmill at Merrill; that the pine lands of the plaintiff named in the complaint were in close proximity to the lands of the Illinois Company; that in November, 1895, Mr. F. Weyerhauser, the president and manager of the plaintiff corporation, called at the office of the Illinois Company in Chicago, and saw Mr. W. W. Schultz, the president of the Illinois Company, and agreed upon the terms of the sale of the standing pine upon the lands in question to said Illinois Company for $12,000, it being then understood that the Illinois Company wished to cut the timber immediately and get the logs out with their own logs, and that the agreement was to be reduced to writing after Mr. Weyerhauser returned from the East, where he was then going; that Mr. Weyerhauser returned from the East in January or February, 1896, and that upon his return the Illinois Company desired more time to cut and remove the timber; that

this additional time was granted by Mr. Weyerhauser by correspondence, and three years was given to cut and remove the timber on condition of the payment of the taxes on such lands as were uncut after May 1, 1897, but in other respects the terms of the oral agreement remained practically unchanged; that the written agreement was finally signed by both parties May 11, 1896, and is follows:

"Know all men by these presents, that the *Mississippi River Logging Co.*, a corporation of Clinton, Iowa, of the first part, for and in consideration of twelve thousand dollars, to be paid by the Illinois and Wisconsin Lumber Co., a corporation of Chicago, Ill., of the second part, have bargained, sold, granted, transferred, assigned, and conveyed, and by these presents do bargain, sell, grant, transfer, assign, and convey, unto the said party of the second part, its successors and assigns, all the pine timber standing, laying, or being upon the following described lands, to wit [description of lands omitted], with the right to enter upon said lands at any time within three years from date to cut and remove said pine timber. And it is expressly agreed that, until all payments hereinafter mentioned have been made, the title, ownership, possession, and right of possession of said timber and the saw logs which may be cut therefrom or the lumber manufactured therefrom, wherever the same may be, shall be and remain in the party of the first part. Said party of second part to pay taxes on all lands uncut after May 1, 1897, until cut and released by said second party. The said second party agrees to pay for said timber the aforesaid sum of twelve thousand dollars, with interest thereon at five per cent. per annum, payable ½ May 1st, 1896, and ½ July 1st, 1896. To have and hold the same unto the said party of the second part, its successors and assigns, forever. And it does, for its successors and assigns, covenant and agree to and with the said party of the second part that it is the lawful owner of said property; that the same is free from all incumbrances; and that it has good right to sell the same as aforesaid, and will warrant and defend the said property hereby sold unto the said party of the second part, its successors and assigns, against the lawful claims and demands of all persons."

It further appears that during the winter of 1895 and 1896, and prior to May 1st, the Illinois Company cut about

3,000,000 feet of timber from the lands in question, all of which it marked with its own recorded mark "box two" [2], and mixed the same with about 2,000,000 feet of its own logs, and shipped the same to Merrill, where the same was sawed, and mingled with its own lumber, and piled in its own lumber yard, so that it was impossible to separate or distinguish it; that on the 11th of May, 1896, the Illinois Company made the first payment of $6,000 with interest, and inclosed in the letter a list of the lands which had been cut and those which were still uncut, by which it appeared (as the fact really was) that the lands in sections 6 and 18 were still uncut; that on the 27th of June following the Illinois Company applied for a sixty-day extension of time in which to make the second payment, stating that only twenty or twenty-five per cent. of the logs had been cut (which was the fact), and that the balance would be removed during the coming winter; that an extension of time was granted by the plaintiff until September 1, 1896, by a letter dated July 8, 1896, and that between the middle of July and the middle of September, 1896, the Illinois Company cut from section 18 logs amounting to nearly 1,000,000 feet; that on September 21, 1896, the Illinois Company applied for further time to make the second payment, and stated in its letter that the greater part of the timber still remained uncut; that neither the plaintiff nor its officers knew that any logs had been cut during the summer, and that payment was not pressed, but the matter was allowed to run without definite extension of time until January 12, 1897, when the Illinois Company, being insolvent, made assignments for the benefit of its creditors, both in Illinois and Wisconsin; that the assignee of said company paid thirty per cent. in dividends to its creditors, but the plaintiff filed no claim.

It further appeared that July 29, 1895, the Illinois Company, by a written agreement, sold the lumber then in its

yard at Merrill, together with its entire cut for the year, to the defendants, the same to be delivered in piles at the yard in Merrill, and marked with the defendants' name, as fast as 1,000,000 feet was sawed and piled; that this contract was renewed April 27, 1896, so as to cover upon the same terms the entire cut of the mill in 1896, and pursuant thereto substantially all of the cut of 1896 was delivered to the defendants as fast as it was sawed, and the defendants assumed control thereof, and made payments from time to time, the last final payment being made November 27, 1896; that the defendants made no inquiry as to the title to any of the lumber, and that the last-named contract contained a guaranty by the Illinois Company that it had good title and would protect the same from all claim; that the defendants had no actual knowledge or notice, until making payment in full, of the terms of the contract between the Illinois Company and the plaintiff, and did not know that the plaintiff claimed to own the lumber or claimed any lien thereon,—on the contrary, that they bought and paid for the same in good faith; that the defendant sold all of said lumber, which came from the plaintiff's lands, and that the same was of the value of $18,000; that the timber left standing upon the lands was taken possession of by the plaintiff after the failure of the Illinois Company, and sold, and the net proceeds applied upon the unpaid contract with the Illinois Company, after which application there still remained due upon said contract $3,756.28; that no consent was given by the plaintiff to the sale of the lumber, either in writing or by parol, unless consent may be inferred from the facts stated, and that the plaintiff first learned of the sale to the defendants after the failure of the Illinois Company; that the plaintiff took no steps to mark the logs in any way, or to ascertain what the Illinois Company expected to do with the logs; that Mr. Weyerhauser knew that the Illinois Company had a mill at Merrill very soon after the shipping of the logs to Merrill

commenced, and knew that logs were being shipped there, but made no inquiries, and testified that he did not care anything about where the logs went; that January 26, 1897, the plaintiff demanded from the defendants the return of the lumber, or the amount due from the Illinois Company, which demand was refused, and this action brought.

These facts appearing either on the undisputed evidence or by the findings of the court, judgment was rendered for the plaintiff for $3,756.28, with interest and costs, and the defendants appeal.

For the appellants there were briefs by *Hurley, Ryan & Jones*, attorneys, and *Hooper & Hooper*, of counsel, and a separate brief by *Hooper & Hooper*, and oral argument by *M. A. Hurley* and *Ben. Hooper*. To the point that there had been an estoppel *in pais* they cited *Buchanan v. Moore*, 13 Serg. & R. 304; *Strong v. Ellsworth*, 26 Vt. 366; *Mitchell v. Reed*, 9 Cal. 204; *Quirk v. Thomas*, 6 Mich. 76; *Dezell v. Odell*, 3 Hill, 221; *Continental Nat. Bank v. Nat. Bank*, 50 N. Y. 575, and cases cited; Herman, Estoppel, § 775, and cases cited; *Frost v. Saratoga M. Ins. Co.* 5 Denio, 154; *Lucas v. Hart*, 5 Iowa, 415; *Dickerson v. Colgrove*, 100 U. S. 578; *Preston v. Mann*, 25 Conn. 118; *Anderson v. Hubble*, 93 Ind. 570; *Racine Co. Bank v. Lathrop*, 12 Wis. 466; *Vilas v. Mason*, 25 Wis. 310, 323; *Radant v. Werheim Mfg. Co.* 106 Wis. 600, and cases cited; *Gatling v. Rodman*, 6 Ind. 289; *Catherwood v. Watson*, 65 Ind. 576; *Richardson v. Chickering*, 41 N. H. 380; *Ashby v. Ashby*, 46 Atl. Rep. 522; Chitty, Cont. (11th ed.), 534; *Pickering v. Busk*, 15 East, 38; *Lewenberg v. Hayes*, 91 Me. 104; *Heath v. Stoddard*, 91 Me. 499; *Spooner v. Cummings*, 151 Mass. 313; *Winchester W. W. & M. Co. v. Carman*, 109 Ind. 31; *Frei v. McMurdo*, 101 Wis. 423; *Two Rivers Mfg. Co. v. Day*, 102 Wis. 333; *Neubauer v. Gabriel*, 86 Wis. 201; *Walker v. Grand Rapids F. M. Co.* 70 Wis. 92; *Wing v. Thompson*, 78 Wis. 256; Mechem, Agency, §§ 338, 773; *Bouck v. Enos*, 61 Wis. 660–664; 1 Parsons, Cont. 44; *Kasson v. Noltner*, 43

Wis. 650; *Lickbarrow v. Mason*, 2 Term, 70; *Hern v. Nichols*, 1 Salk. 289; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 69; *Preston v. Witherspoon*, 109 Ind. 457; *Parker v. Patrick*, 5 Term, 175; *Quick v. Milligan*, 108 Ind. 419; *Smith v. Shell Lake L. Co.* 68 Wis. 89.

For the respondent there was a brief by *Clapp & Macartney*, and oral argument by *N. H. Clapp*.

WINSLOW, J. The timber contract before us was a contract for the sale of an interest in land. Its terms are substantially identical with the terms of the contract involved in the case of *Bent v. Hoxie*, 90 Wis. 625. Whether the interest in the timber which was secured to the plaintiff be technically a reservation or an exception is a question of little moment. The contract secured to the plaintiff a paramount title to the timber until the purchase price was paid, which could be enforced by replevin as against the opposite party. These propositions are not open to doubt since the decision of this court in the case of *Lillie v. Dunbar*, 62 Wis. 198, which was followed by the cases of *Bent v. Hoxie*, *supra*, and *Hyland v. Bohn Mfg. Co.* 92 Wis. 157.

The Illinois & Wisconsin Company doubtless had an interest in the logs and lumber, but it was not a perfect title, but rather a right to acquire title by payment of the price, which right could not ripen into title as against its vendor until such price was paid. Not having title itself, it could not convey title. These general common-law principles governing conditional sales of personal property where title is not to pass until the purchase price is paid are supported by the great weight of authority. It is true that in many states, including our own, statutes have been passed requiring the filing or recording in some proper office of such conditional contracts of sale, in order to make them valid as against third persons (Stats. 1898, sec. 2317), but, as the sale here was a sale of an interest in real estate, instead of personal

property, this statute is of no moment, save, perhaps, that it impliedly recognizes the existence of a contrary rule at common law, and also indicates legislative dissatisfaction with such common-law rule, and the deliberate adoption of a radically different policy.

In the case of *Harkness v. Russell*, 118 U. S. 663, the subject of such conditional sales and the rights of vendor and vendee as well as of the vendee's creditors and transferees is learnedly discussed by Mr. Justice BRADLEY, and a great number of cases cited upon the subject from many states. The conclusion reached in the opinion is that, while there are some decisions (notably in Pennsylvania and Illinois) holding that an execution creditor or *bona fide* purchaser of a conditional vendee who is clothed with possession and apparent ownership of a chattel will be protected against the claim of the original vendor, still that such decisions are few in number compared with the overwhelming number which hold that, in the absence of fraud, conditional sales are valid and lawful as well against third persons as against parties to the contract. Among the states holding to the latter doctrine he enumerates Massachusetts, Connecticut, Maine, New Hampshire, Vermont, New York, Ohio, Indiana, Michigan, Missouri, and Alabama. It is to be noted that, so far as the rights of a *bona fide* purchaser are concerned, the discussion was practically *obiter*, because the purchaser in that case had full notice of the rights and claims of the vendor before he made his purchase (see close of the opinion in that case). But the case definitely settles and adopts the general principle that, in the absence of fraud, an agreement of conditional sale is valid as well against third persons as against the parties to the transaction, and that a bailee of personal property cannot convey the title, nor subject it to execution for his own debts, until the condition on which the agreement to sell has been performed.

We see no reason to question the correctness of the general

rule laid down in that case; indeed, it is substantially in accord with the doctrine of this court as announced in *Lillie v. Dunbar*, 62 Wis. 198; but it in no way trenches upon the equitable principles of estoppel. If it appear that the vendor under an agreement of conditional sale has so conducted himself in the transaction that it would be a fraud upon innocent third persons, who have purchased the property relying on the vendee's apparent title, to allow the vendor to assert his title upon the property, then the vendor will be estopped from asserting such title. We have found no case which denies this general proposition, and many of them either expressly or impliedly recognize it. The very case of *Harkness v. Russell*, so much relied on here, recognizes it by limiting the principle which it states to cases in which there is "absence of fraud." The question is, What facts will constitute an estoppel? It is quite generally held that the mere giving of possession to the vendee will not raise an estoppel. There must be something more than this. But if a vendor conditionally sells to a vendee goods, and gives him the *indicia* of ownership, with the agreement, express or implied, that he is to sell them as his own, then there can be little doubt but that the vendor will be estopped from asserting title thereto as against an innocent third person who has purchased of the vendee in ignorance of any infirmity or reservation of title. This becomes the case of one who has silently stood by and allowed another to deal with his property and sell it to a third person who advances his money in good faith. He has consented to the sale as effectively as if corporeally present, and will not be heard to retract his consent to the prejudice of him who has changed his position relying thereon.

This principle is not only well established by numerous authorities, but some of them are from states which hold the general principle laid down in *Harkness v. Russell*, 118 U. S. 663. Thus, in *Spooner v. Cummings*, 151 Mass. 313, the

plaintiff had sold a horse to one Pope under a conditional agreement that title should remain in plaintiff until the horse was paid for, and Pope, without paying for the horse, sold it to the defendant, who was an innocent purchaser. It was held that evidence tending to show that, according to the course of dealing between the plaintiff and Pope, it was expected that Pope was to resell the horse, was admissible, and that if it appeared that the plaintiff expressly or impliedly authorized the sale the defendant, having bought in good faith from the apparent owner, acquired a good title by estoppel.

So, in *Lewenberg v. Hayes*, 91 Me. 106, where the plaintiff, being a merchant, sold goods to the defendant's vendor (also a merchant) knowing they were to be put on sale, it was held that the defendant (an innocent purchaser) had a right to reply upon such apparent authority, and that the plaintiff was estopped from asserting a claim that he had not parted with title to the goods.

So, also, in *Winchester W. W. & M. Co. v. Carman*, 109 Ind. 31, it was held that a manufacturer and wholesaler of goods, who sells the same on credit and delivers them to a retail dealer for the express or implied purpose of resale, cannot reserve in himself the title which he can assert against innocent purchasers from such retail dealer. To the same effect are *Fitzgerald v. Fuller*, 19 Hun, 180; *Devlin v. O'Neill*, 6 Daly, 305.

Indeed, the proposition seems to be so clearly within the well-understood principles governing estoppel *in pais* that authorities upon the exact point are hardly necessary. Consult, also, *Leigh Bros. v. M. & O. R. Co.* 58 Ala. 165; 1 Benj. Sales (4th Am. ed., by Corbin), § 448, p. 412; *Pickering v. Busk*, 15 East, 38.

But it seems to have been considered that this question has been settled adversely to the defendants' contention by the case of *Lillie v. Dunbar*, 62 Wis. 198. That was an ac-

tion of replevin. The facts appearing from the case and briefs on file were that one Wilcox had bought of Lillie, by oral contract, a quantity of standing timber for $100, to be paid in the future, with the right to remove the same, but on condition that title should not pass until the purchase price was paid. Wilcox made a contract with Dunbar to cut and manufacture the timber into lumber and deliver it to Dunbar at certain prices, on which contract $300 was paid down. Wilcox cut and manufactured the logs, or a part of them, into lumber, and delivered the same to Dunbar. Wilcox did not pay Lillie for the logs. Lillie claimed that before Dunbar had paid Wilcox for the lumber, and while there was yet a considerable sum to come due, he (Lillie) notified Dunbar of his claim; but Dunbar claimed that Lillie simply inquired of him if Wilcox had left $100 there for him for timber sold. The case was submitted to the jury on the theory that it was a sale of personal property, and they were charged that the only question was whether Dunbar received notice of Lillie's interest in the property at the time of the purchase or before he paid for the lumber; and, if he did, then they were instructed that the plaintiff should recover, but if not, then the defendant should have a verdict. Upon this charge the verdict was for the plaintiff, thus, in effect, deciding that Dunbar had timely notice of Lillie's rights in the lumber. The answer in the case consisted simply of an admission of possession of the lumber and a denial of all other allegations of the complaint. There was no issue of estoppel raised in the case. Upon this state of the record the defendant appealed, and upon the appeal his principal contention was that the contract between Lillie and Wilcox was a conditional sale of personal property, and void as to Dunbar because not filed as required by the statute. Addressing itself to this proposition, the court held that it was erroneous, and that the contract was a contract for the conveyance of an interest in land, and hence not governed by the law

requiring the filing of contracts for the conditional sale of personal property, overruling certain remarks made in *Cadle v. McLean*, 48 Wis. 636, and *Bunn v. Valley L. Co.* 51 Wis. 376. In the opinion it was said that a purchaser from Wilcox could acquire only such rights as Wilcox actually had under his contract with Lillie. This was strictly correct, as applied to the facts of that case; but the fact that title might pass by estoppel was recognized in the opinion, for it was expressly stated that if Lillie knowingly, and without objection, permitted Wilcox to sell the property to a *bona fide* purchaser, he would undoubtedly have lost his right to claim the property as against such purchaser.

This case was followed by *Wing v. Thompson*, 78 Wis. 256, which was a case involving the rights of a conditional vendor of standing timber against a purchaser from the conditional vendee, the contract itself being substantially in the same form as the one now before us. In that case the defense of estoppel was relied upon by the defendants, and it was said in the opinion that "a contract of this kind is not favored in the law, and the right to enforce the reservations as against a *bona fide* purchaser without notice must be based upon evidence which shows that the plaintiff has not done anything in regard to such property while in the hands of his vendee which would amount to a waiver of his right or estop him from asserting his title against a purchaser from his vendee." The following instruction, proposed by the defendant, was refused: "In determining the question of waiver or license, the jury are instructed that the plaintiff's permitting the logs to be moved from the town of Bayfield to the town of Washburn, and permitting the logs to be manufactured into lumber, extending the time of payment of the last $3,000, and failure to assert any claim to the logs or lumber for more than one year after the last note became due, is evidence tending to prove waiver of lien, and license and permission to manufacture into lumber and sell."

On the contrary, the court charged that "the mere fact that Wing knew of such removal and sawing and piling at their mill, and knew that they intended to sell or had sold them, to be delivered on board boats, some of such lumber to defendants, and did not object thereto, that would not be a waiver or abandonment of his lien upon all the logs and lumber on the docks." This court said: "Whether the facts stated in this latter instruction would be a waiver of plaintiff's claim of title to the logs in question was, we think, a question of fact for the jury to determine, and not of law for the court, and [the instruction] was, therefore, erroneous. The facts proved on the trial clearly tended to establish the claim of waiver and estoppel, as insisted by the defendants; and the court should have submitted the same to the jury without stating that, as matter of law, those things did not amount to a waiver. That courts universally hold that the matters claimed to have been proven by the defendants in this case are competent evidence on the subject of waiver of the rights of the plaintiff reserved in his contract will be seen by examination of the following cases, as well as of many others which might be cited: *Peabody v. Maguire*, 79 Me. 572; *Winchester W. W. & M. Co. v. Carman*, 109 Ind. 31; Benj. Sales (3d Am. ed.), § 19, pp. 18, 19, and cases cited in notes." This opinion was written by the same justice who wrote the opinion in *Lillie v. Dunbar*, 62 Wis. 198, and in no part of the opinion is there any indication that he considered that the *Lillie Case* was thereby in any way overruled or limited.

We conclude, therefore, that there can be no question in this state but that a conditional vendor may, by his acts, be estopped from asserting his title as against a purchaser of his vendee; and the serious question in this case is whether the facts show such an estoppel. *Bardon v. McCall*, 108 Wis. 181. The simple principle is that if the conditional vendor, having given the vendee possession and apparent

authority to sell the property, either expressly or impliedly consent to such sale by his vendee, he will be estopped from asserting his rights to the injury of a purchaser who bought in the ordinary course of business, and paid for the property without notice.

Do the facts proven bring the plaintiff within this principle? In order to properly answer this question, a brief review of the main facts will be useful. The plaintiff's president, Mr. Weyerhauser, transacted all of the business on the part of the plaintiff. In November, 1895, the Illinois & Wisconsin Lumber Company was engaged in the logging and lumbering business, having pine lands in Lincoln county, and a mill at Merrill, and an office in Chicago. All these facts Mr. Weyerhauser knew at the time the negotiations commenced, except that he says that he did not know *where* their mill was, but admits that he learned that it was at Merrill after they began to cut logs. In November, 1895, knowing that the Illinois Company was manufacturing and selling lumber, he orally negotiated the sale of the logs in question to them. He was informed that they wanted to cut the timber right away and get it out with other timber which they had in the vicinity. Unquestionably he knew that it was the intention to manufacture and sell the lumber when manufactured, because that was their business, and any other conclusion would be absurd and an imputation upon his business sagacity. Knowing these facts, he took absolutely no measures to preserve anywhere any indication that the title to the logs remained in the plaintiff. He caused no mark to be put upon them, and, on the contrary, tacitly acquiesced in allowing the Illinois Company to mark them with their own mark, and this while knowing that they were to be mixed indiscriminately with the other logs of the Illinois Company. Knowing or having every reason to believe that they were to be manufactured into lumber, he took no measures to see that the lumber

was marked in any way so as to distinguish it, or even piled by itself, but tacitly allowed it to be mixed with other lumber, so that its identity was lost. It will hardly avail to say that he had no actual knowledge of what was done with the logs after they were cut, or that he did not know or care where they were going to, as he testifies in effect. Knowing that his logs were going into hands of manufacturers and dealers, it was clearly his duty to apprehend that in all human probability they were to be cut up and sold; and the fact that he turned his back and closed his eyes to the further proceedings will not excuse the failure to exercise those ordinary and obvious precautions which would suggest themselves to any mind, not only as a measure of safety to himself, but as means of preventing injury to others. In effect, the conclusion cannot be escaped that he sold to a manufacturer and dealer property which he knew was to be manufactured and sold, and which was within the ordinary business of the dealer to sell. He gave immediate possession, and allowed that possession to be accompanied with all the *indicia* of title and apparent right to sell; and we think that when, as appears in this case, the property has been sold in the ordinary course of business to a purchaser without notice of the plaintiff's claim, and who has paid the full purchase price before receiving any notice thereof, the principle that the plaintiff is estopped from asserting its claim must apply.

The extensions of time for the payment of the last half of the purchase money are also facts which have a bearing on the question. The last payment was to be made July 1, 1896, but it was extended until September 1st. At this time application was made for further extension, and it was granted by forbearance of any attempt to collect until after the failure in January, 1897. At the time of application for the last extension it appears also that the plaintiff had express notice that the Illinois Company was actively en-

gaged in selling its lumber. In the letter of September 21st the Illinois Company said, "The exceeding stringency in the money market has operated to compel us to carry and make extensions to parties owing us, and also to prevent our realizing on paper *which we are taking for the sale of stock.*" Here, if never before, actual knowledge of the fact that the Illinois Company was engaged in the business of selling lumber was brought home to the plaintiff, and yet not only were no steps taken to ascertain the situation or give notice of the plaintiff's rights or claims, but forbearance was given for nearly four months, during which time the defendant paid a large part of the purchase money in ignorance of any adverse claim. It is true that the Illinois Company stated in a letter of June 27, 1896, that it would not remove the balance of the timber until the coming winter, and that a million feet was in fact cut in July and August, but we cannot regard this promise as excusing the plaintiff's lack of diligence. Summer logging is not infrequent, and it remained within the power of the Illinois Company under its contract to cut and manufacture at any time. The means of knowledge as to the actual fact were at hand. Good faith towards others, as well as due regard for its own rights, called for knowledge, or an attempt to acquire knowledge, instead of a studied endeavor to remain ignorant.

Under the facts shown, we think the court should have found as a fact that the plaintiff was estopped from asserting its title. Had the case been tried before a jury, the question would have been one for the jury under proper instructions, as held in *Wing v. Thompson*, 78 Wis. 256.

By the Court.—Judgment reversed, and action remanded with directions to render judgment for the defendants dismissing the complaint.

109 94
111 [1]627
109 94
112 [1]329
f112 [2]333
56 LRA 266
109 94
116 [1]647

LUESSEN, Administrator, Respondent, vs. OSHKOSH ELECTRIC LIGHT & POWER COMPANY, Appellant.

January 12 — February 1, 1901.

Negligence causing death: Pleading: General and special damages: Parent and child.

1. In an action under secs. 4255, 4256, Stats. 1898, for the negligent killing of a boy, allegations that he was not married, that he was seventeen years of age at the time of his death, and was an intelligent, healthy young man, capable of doing business and earning considerable sums of money, and that he left a father surviving, are *held* sufficient to warrant the recovery of the ordinary value of the services of an ordinary boy of the age of deceased for the balance of his minority, but not of any special damages by reason of the peculiar ability of the deceased to earn money, or for loss based on reasonable anticipation of receiving pecuniary benefits from a continuation of the life of the deceased subsequent to his minority.
2. As between a parent and a wrongdoer who has negligently caused the death of his minor son, the parent is entitled to damages for loss of services, notwithstanding a probability that, had the son lived, the father might have allowed him to spend his time in idleness, or might have given him his time.

APPEAL from an order of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

Action by the personal representative of Edward W. Luessen, deceased, under secs. 4255, 4256, Stats. 1898. The complaint contained appropriate allegations to show that the death was produced by the negligent conduct of defendant. The allegations relied upon to show pecuniary loss to the father were as follows: Said Edward W. Luessen was not married; he was seventeen years of age at the time of his death, and was an intelligent, healthy young man, capable of doing business and earning considerable sums of money, and left a surviving father.

Defendant demurred to the complaint for insufficiency. The demurrer was overruled, and defendant appealed.

For the appellant there were briefs by *Thompson, Harshaw & Thompson*, and oral argument by *J. C. Thompson* and *A. E. Thompson*.

For the respondent there was a brief by *Felker, Stewart & McDonald*, and oral argument by *C. W. Felker*.

MARSHALL, J. It is so well settled that a complaint to enforce the cause of action given by secs. 4255, 4256, Stats. 1898, must contain a statement of the facts showing the survivorship of some one of the persons for whose benefit the statutory right was created, and that such person was pecuniarily interested in the continuance of the life that was wrongfully terminated, that we deem it unnecessary to discuss the subject.

Counsel for respondent concede the proposition contended for by appellant on this appeal, to the extent indicated, but say that the calls of the statute are satisfied by facts expressly or by necessary implication stated in the complaint. Counsel for appellant say that the damages recoverable are, in their nature, special, and that they must be pleaded with all the particularity required by the rule as to such damages, strictly so called. True, the damages are special in a sense, but they are not such within the general meaning of the term. Many cases are cited to our attention where the term "special" is used in regard to such damages. It is not necessary to refer to and review them in detail. The distinction between general and special damages is that the former are necessarily implied from the wrong, while the latter are only attributable to the wrong by reason of some circumstance or circumstances not generally present in such a situation. For instance, if a person be deprived, by the wrongful act of another, of the capacity to labor and earn money, the general damages that result are considered to be the reasonable value of the services of an ordinary person of his age, at ordinary labor. In order to warrant a

recovery upon the basis of ability to earn $100 per month, because when the injury took place the injured person was engaged in special work for compensation to that amount, the facts in that regard must be pleaded. *Tomlinson v. Derby*, 43 Conn. 562. The damages recoverable in an action of this kind are not necessarily special, except in the sense that a particular person is entitled thereto. However, such person may be so circumstanced as to be entitled to general damages as well as special damages. The former are sufficiently pleaded by pleading the facts from which, as a matter of law, they are necessarily implied. The latter can only be recovered by pleading the special circumstances giving rise to them. Here it is stated that the deceased was seventeen years of age, that he was intelligent, in good health, and capable of earning considerable sums of money, and that he left a father surviving. The necessary implication from those allegations is that the surviving father has been deprived of the reasonable value of the services of an intelligent son who was in good health and capable of earning considerable sums of money for the last four years of his minority. There is nothing in such allegations indicating that the deceased was above the average of boys of his age, or that his services were worth any more than those of boys generally, of his age. No special damages, strictly so called, are pleaded; but the complaint is good as regards the damages that the surviving father has suffered as a matter of law from the facts stated,—the loss of the ordinary value of the services of an ordinary boy of seventeen years of age, for the balance of his minority. Those damages are special in the sense that they are recoverable only for the benefit of the father, and because there is a father in being to claim them. The facts in that regard are pleaded. They are general damages to the father because they are such as by necessary implication befall a father under the circumstances stated. Hence, a statement of the facts from which

such damages are inferable is all that is necessary. It satisfies the rule that the facts must be stated showing that the beneficiary under the statute has sustained pecuniary loss by the wrongful taking away of his relative, not leaving the circumstance of loss to be inferred from the mere circumstance of the wrongful deprivation of life. *Regan v. C., M. & St. P. R. Co.* 51 Wis. 599, 601.

In the case cited, which is appellant's chief reliance, a complaint, in an action for damages for the negligent killing of a husband and father, was condemned because it did not state any fact indicating pecuniary loss to the widow other than that she was left surviving with a family of several children. It was said that pecuniary loss to a surviving widow under such circumstances is not necessarily to be implied. However, it was said that probably the complaint would have been sufficient if it had shown the age of the deceased and that he was of sufficient ability to contribute to the support of his family. The rule adopted is rather severe and should not be extended; yet, as we have seen, a mere statement indicating ability to earn money, which by reasonable inference would be devoted, in part at least, to the support of the family, would have cured the weakness in the complaint, discovered by the court. That field is fully covered here by the allegations that the deceased was intelligent, in good health, and capable of earning considerable sums of money.

The rule laid down in *Chicago v. Hesing*, 83 Ill. 204, 207, cited by respondent's counsel, is unquestionably sound, that where the person wrongfully killed is a minor and leaves a father who would have been entitled to his services had he lived, the law implies pecuniary loss for which compensation under the statute is given. Of course, the damages so implied are general damages only, such as necessarily ordinarily spring from such a situation, and must be so limited on the trial, if the allegations in the complaint, as in this

case, only state the facts necessary to the implication. The probability that the father might have allowed his son to spend his time in idleness, or might have given him his time, had he lived, does not militate at all against the fact of pecuniary loss. If a person is deprived of his capacity to work by the wrongful conduct of another, it was never supposed that the latter can benefit by the possibility or probability that his victim might in any event have spent his time in idleness. The surviving father here was entitled, as a matter of right, to the services of his son. As between him and the wrong-doer, the latter has deprived him of that right. It is entirely immaterial what disposition he would have made of his son's time had he lived. If one deprive a person of anything of value, the loss to the latter in a legal sense is not lessened at all by the circumstance, if it exist, that he intended never to enjoy it, or to bestow it as a gratuity upon another.

What has been said sustains the complaint only as a claim for loss of service of the deceased during the balance of his minority. No fact is pleaded from which loss can be claimed, based on reasonable anticipation of receiving pecuniary benefits from a continuation of the life of the deceased subsequent to his minority. As we understand it, respondent concedes that.

By the Court.—The order is affirmed.

HEINZE, Appellant, vs. SOUTH GREEN BAY LAND & DOCK COMPANY and others, Respondents.

109 99
113 [4]881

109 99
116 [7]140

January 14—February 1, 1901.

Corporations: Defective organization: Right to do business: Personal liability of stockholders: Estoppel: Officers: Authority to make contracts: Payment on stock: Presumptions: Court and jury.

1. The personal liability of stockholders in a corporation upon obligations incurred before it was authorized to transact business with others than its members is governed by the statute in force when such obligations were incurred.
2. In an action to enforce the personal liability of stockholders under sec. 1773, S. & B. Ann. Stats., defendants who had subscribed for stock in the corporation, accepted office in it, and assumed to act as directors in the transaction of corporate business cannot deny that they were stockholders.
3. Where one of the subscribers to stock was elected president at a meeting of certain of the signers of the articles of incorporation who had elected themselves directors, and such person acted as president with the knowledge of, and upon direct authority conferred by, the board, his title to the office cannot be tried in a collateral proceeding; and the persons who assisted in his election, and who have since acted with him, are estopped, as against third parties, from questioning his title to the office.
4. Where a person has been elected president of a corporation by a *de facto* board of directors, and, by a by-law, has been given general supervision of its entire business and authority to sign all contracts, the corporation is bound by a contract made by him in its name with a third person, which is directly in line with the general purpose and course of business of the corporation, and necessary in order to fully carry out the corporate purpose.
5. After the organization of a corporation to develop a tract of land in the neighborhood of a city, a surveyor came to the directors with a letter of introduction from the president, and as officers they directed his operations in platting the land, a work which was necessary to carry out the purpose of the corporation. In an action by him under sec. 1773, S. & B. Ann. Stats., to enforce the personal liability of the stockholders for his services, *held*, that the directors were estopped to deny knowledge of the contract, executed by the president in the name of the corporation, under which the surveyor performed the work.

6. The fact that the directors had a secret agreement with the president that no corporate liability should be incurred until he had provided funds sufficient to pay, would not relieve them from personal liability.
7. The personal liability of stockholders in such a case does not depend upon knowledge or acquiescence by the individual stockholder, but rather upon his relation to the corporation.
8. A corporation was organized for the development of a tract of land, with a capital stock of 10,000 shares of $100 each, M. subscribing for 9,996 shares. At a meeting of the directors a resolution was adopted that the company negotiate with M. for the purchase of said tract at a price not exceeding $1,000,000, payable in stock. Two weeks later M. conveyed the property to the corporation, subject to the incumbrances, for a recited consideration of $700,000. M. had shortly before purchased the land by giving a mortgage for $44,000 on it and assuming prior mortgages and liens, and it appeared that it was mortgaged for its full value. There was nothing to show that there were any negotiations under said resolution, or that the conveyance was received as a payment on stock. *Held*, that it could not be assumed that said $700,000 was a payment of seventy per cent. of the stock of the corporation.
9. In an action to enforce the personal liability of stockholders in a corporation, under sec. 1778. S. & B. Ann. Stats., the fact that a defendant had signed the original subscription list for stock, together with his admission that he was a stockholder and acted as president of the corporation at a date subsequent to the making of plaintiff's contract, is *held* sufficient, at least, to justify the submission to the jury of the question whether he was a stockholder at the time said obligation was incurred.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

The defendants *Elmore* and *Vander Zee* with others, constituting the Allouez Improvement Company, were the owners, subject to several mortgages and liens, of a considerable tract of land a few miles south of the city of Green Bay, which had been purchased with a view to platting and development. In the summer of 1894 they had negotiations with a Chicago attorney and promoter, *Marks*, resulting in the sale to him of said land for $44,000 in excess of the existing mortgages and liens, on the understanding that *Marks*

would be able to develop the same, relieve them and their associates from the liability which they were under for the purchase price of the land, and incidentally promote the prosperity of the city of Green Bay, of which *Elmore* was mayor. *Marks* explained to them the necessity, to the accomplishment of those plans, of the organization of a corporation, and the necessity of Wisconsin citizens to effect such organization; whereupon said *Elmore* and *Vander Zee* and the defendant *Hollman* executed articles of association, on July 2, 1894, for the organization of the *South Green Bay Land & Dock Company*, on a capital of $1,000,000. Thereafter a subscription for capital stock was signed, whereby *Marks* subscribed for 9,996 shares, and *James H. Elmore*, *Fred. A. Hollman*, *Frank Vander Zee*, and *Albert Heimann* each for one share.

Nothing further was done towards incorporation until February 7, 1895, at 10 o'clock of which day an attempted stockholders' meeting was held, but appears to have been suspended by reason of the discovery that the articles of association had not yet been filed. They were accordingly filed at 10:45 a. m., and at half past 11 a new stockholders' meeting was held, at which were present all of the subscribers to capital stock except *Hollman*. That meeting elected *Marks*, *Elmore*, and *Vander Zee* a board of directors. At noon of that day the three directors met in directors' meeting, and elected *Marks* president, *Elmore* vice-president and treasurer, and *Vander Zee* secretary. At an adjourned meeting of the directors on the same day a resolution was adopted that the company negotiate with *Marks* for the purchase of the lands in question at a price not exceeding $1,000,000, payable in stock of the company at par, and that upon completion of such purchase the president and secretary be authorized to issue capital stock in payment of the purchase price. Thereafter frequent directors' meetings were held, usually by *Elmore* and *Vander Zee*, at one of

which were adopted by-laws, among others, defining the duty of the president to exercise general supervision over the entire business of the company and management of every department, and providing that all the property of the company should be under his control, and that he should execute all bonds, contracts, or other instruments. The articles of association also provided, among the principal duties of the president, that he should have general supervision of the affairs of the corporation, and sign all deeds, leases, contracts, and conveyances.

On February 27th attempted meetings of both stockholders and directors were held, authorizing the issue of bonds to the amount of $300,000, and the securing of the same by mortgage on the lands; and a corporate seal was adopted. On that day *Marks* executed a deed to the corporation of the lands he had purchased, as above mentioned, for the expressed consideration of $700,000. The defendants testify that *Marks* agreed that he would not incur any obligations on behalf of the corporation until he had raised money to clear off the incumbrances on the land and to proceed with the development and promotion thereof; the amount not being very definite in the testimony, but varying from $100,000 to $400,000.

On March 9, 1895, *Marks*, at Chicago, entered into a contract, in form between the corporation and the plaintiff, for the survey and platting of the lands at the price of $1,350, payable at times therein stipulated. Plaintiff immediately proceeded to Green Bay, and performed the contract on his part under the eye and with the knowledge of *Elmore* and, to some extent, *Vander Zee*, who, however, claimed to have had no knowledge that he was working under a contract with the company, but supposed he was employed by *Marks*. The jury find that *Elmore* did know of the existence of the contract. Plaintiff received $100 upon account from *Marks*, $65 advanced to him by *Elmore*, as the latter claims by way

of loan, and $30 in a guaranty by *Elmore* of the bill for stakes to be used in the survey. After completing the contract in June, *Marks* gave the plaintiff notes of the corporation, signed by himself as president, which never were paid. Plaintiff sues the corporation and the five stockholders for the balance due on that contract.

A special verdict was taken, finding that plaintiff had good reason to believe, and did believe, in the authority of *Marks* as president to make the contract; that *Elmore* knew he had the contract; that the defendants *Elmore* and *Vander Zee* did not acquiesce in and accept the work knowing that the plaintiff believed himself to be at work for the corporation; that plaintiff was not notified before the work was done that *Marks* had no authority to bind the corporation.

Both parties moved for judgment, and the court, after filing an opinion, preserved in the bill of exceptions, rendered judgment in favor of the plaintiff against the defendant *Heimann*, together with judgment of nonsuit against *Hollman*, dismissed the action against *Marks* for want of jurisdiction by service of summons, and entered judgment on the merits in favor of the corporation, *Elmore*, and *Vander Zee*. From that opinion the conclusion of nonliability of the corporation and stockholders appears to have been based on the invalidity of the first stockholders' meeting for want of notice and for absence of one of the subscribers to the capital stock, *Hollman*. From that judgment, and the whole thereof, the plaintiff appeals.

John F. Watermolen, attorney, and *W. L. Evans*, of counsel, for the appellant.

H. O. Fairchild, of counsel, for the respondents *Hollman*, *Elmore*, and *Vander Zee*.

BARDEEN, J. This action is against the defendant corporation, and the other defendants as stockholders, to recover of them for services rendered under a contract with the cor-

poration, and for which it is claimed the defendants are liable under sec. 1773, S. & B. Ann. Stats. This section provides that "no such corporation shall transact business with any others than its members, until at least one half of its capital shall have been duly subscribed and at least twenty per centum thereof actually paid in; and if any obligation shall be contracted in violation hereof, the corporation offending shall have no right of action thereon; but the stockholders then existing of such corporation shall be personally liable upon the same." This is the section that was in force when the alleged liability was created, and the defendants' rights must be tested by it, and not by sec. 1773 of the present statutes, as was erroneously supposed by the trial court. His conclusions in denying relief to plaintiff were based upon the assumption that there never had been any officers of the corporation legally elected; that no corporate action had ever been taken with reference to the alleged contract; and that the defendant stockholders never had knowledge of or acquiesced therein. It seems to be practically conceded that the corporation came into existence by the filing of the articles of organization on February 7, 1895, and also that all of defendants became stockholders except the defendant *Hollman*. Concerning him we shall have something more to say later on. There is a suggestion in respondents' brief that *Elmore* and *Vander Zee* did not become stockholders, but as it is conclusively shown that they subscribed for stock, accepted office in the corporation, and assumed to act as directors in the transaction of corporate business, they are not now in a position to deny such relation.

The contract in suit was made with the president of the company, *Mr. Marks*. Its enforcement is now denied, upon the ground that as such officer he had no authority to make it: first, because he was not the president *de jure* or *de facto* of the corporation; second, because he had no power to make such a contract.

The first contention is based upon the ground that there was no proof that the signers of the articles ever assented to or accepted the subscription to stock, and hence there were no stockholders at the time of the alleged election of the board of directors. It is unnecessary to inquire how much force would be given to this suggestion if the controversy were between the original parties. This is not such a case. Here the rights of an innocent third party are involved. *Marks* was elected to office at a meeting of certain of the signers who had elected themselves directors. He acted as an officer of the corporation with the knowledge of, and upon direct authority conferred by, the board. He was recognized as such by the corporation, and his title to the office cannot be tried in a collateral proceeding. *Barthell v. Hencke*, 99 Wis. 660. Such of the defendants as assisted in putting him in that position, and who have since acted with him, as against third parties are estopped from questioning his title to the office.

As regards the second ground, the solution is equally easy. One of the by-laws of the company gave him a general supervision of the entire business of the company, and authority to sign all contracts. In addition, the act in question was directly in line with the general purpose and course of business of the corporation, and necessary in order to fully carry out the corporate purpose. The rules laid down in the following cases are applicable here: *Ford v. Hill*, 92 Wis. 188; *Senour Mfg. Co. v. Clarke*, 96 Wis. 469; *Northwestern F. Co. v. Lee*, 102 Wis. 426; *Hiawatha I. Co. v. John Strange P. Co.* 106 Wis. 111.

There is no question but that all of the defendants, with the possible exception of *Hollman*, knew the work was being done. They aided, assisted, and directed its progress. They were present at different times as it was being carried on. They knew, or must be presumed to have known, that the division of the land into lots and blocks was in

furtherance of the ostensible purpose of the corporation. The plaintiff came to them with a letter from *Marks*. The work he entered upon was necessary in order that the property might be developed as contemplated. The circumstances were amply sufficient to put the defendants upon inquiry as to the source of plaintiff's authority to do the work. As officers of the company they directed his operations, and it is now too late for them to say that they had no knowledge of the contract, even if that fact should be considered a defense. The fact that they had a secret agreement with *Marks* that no corporate liability should be incurred until he had provided sufficient funds to pay does not relieve the defendants from liability, if in fact the work was done for the corporation. A stranger dealing with the corporation without notice of such agreement cannot be affected by it. As officers and directors of the company they were chargeable with some degree of diligence in the management of corporate affairs, and they cannot stand idly by, knowing the corporation was receiving the benefit of plaintiff's labor, and escape liability under the statute on the plea that they did not know the terms of his contract.

This much has been said to meet the theory upon which this case was tried in the court below. We have already determined that the president was clothed with apparent authority to make this contract. It was a contract with a person not a member of the corporation. The obligation thereby contracted was in violation of the statute, which makes the stockholders personally liable. Such liability is not made to depend upon knowledge or acquiescence by the individual stockholders. It rests rather upon their relation to the corporation, which, as we have seen, they are not in a position to deny.

What has been said has been based upon the assumption that stock payments have not been made as required by the statute. We are now met for the first time in this case, it

is said, by the claim that the evidence shows that seventy per cent. of the capital stock had been paid in at the date of the alleged contract. The complaint alleges that no payments upon stock had ever been made. Upon the trial it was shown that the capital stock was 10,000 shares, for which Marks subscribed 9,996 shares, and the other defendants one each. It appears that the land upon which the work was done had been owned by the Allouez Improvement Company, who conveyed it to *Marks*, subject to certain mortgages and liens, on February 14, 1895. He paid no money, but gave a mortgage for about $44,000 for the purchase money, and assumed the prior mortgages and liens. At a meeting of the directors on February 7, 1895, a resolution was passed that the company negotiate with *Marks* for the purchase of this land at a price not exceeding $1,000,000, payable in the stock of the company. On February 27, 1895, Marks conveyed this property to the company for a recited consideration of $700,000. There is no record of any action on the part of the corporation under the resolution of February 7th; no proof of any negotiations between the company and *Marks;* no word in the records that this conveyance was received as a payment on stock. But we are asked to assume that because this conveyance was made, and the consideration was recited to be $700,000, this was a payment of seventy per centum of the stock of the company. No such assumption can be justified, first, because there is no proper evidence to support it; and, second, because the circumstances show that the land was mortgaged for its full value. It is said that there is no allegation in the complaint attacking this transfer. It is alleged that nothing was ever paid on the stock. No attempt was made on the trial to show payment in any way, except a random remark by *Marks* that he transferred land to the company and took stock in payment. The records failed to show any such transaction, and we cannot assume that such was the fact in the face of the other proof in the case.

Mr. Hollman was dropped out of the case on the ground that he was never a stockholder. The record shows that he subscribed for one share. In his deposition he admits that he was a stockholder and acted as president of the corporation at a date subsequent to plaintiff's employment. Unexplained, the court would be justified in assuming that his membership dated from his subscription and its acceptance by the corporation. At least, there was sufficient in the case to justify submission of the question to the jury. It may be that he is in a position where he may insist that his subscription was never accepted by the corporation, and that he has been guilty of no act, as against the plaintiff, that would estop him from taking advantage of that fact. We leave that matter to be considered and determined on a new trial, when all the facts are before the court.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HAVENOR and another, Appellants, vs. PIPHER and others, Respondents.

January 14—February 1, 1901.

Equity: Compelling conveyance of land: Resulting trusts: Mortgages: Laches.

1. In an action by persons claiming to be the equitable owners of land to compel a conveyance thereof to them the evidence is *held* to sustain a finding of the trial court that the entire purchase price had been paid by one of the defendants, in whose name the deed was taken, and that he did not hold the land in trust for the person under whom the plaintiffs claim.
2. In such a case, even if the deed to said defendant was in fact a mortgage to secure advances, a conveyance would not be compelled without repayment of such advances.
3. Sec. 2077, Stats. 1898, would seem to be fatal to any claim that the title was held by said defendant in trust, whatever was the fact as to the payment of the consideration.

4. A delay of twenty-three years after the title was vested in said defendant, before the bringing of an action to compel a conveyance, during all of which time his son (the person alleged to have been the equitable owner and under whom plaintiffs claimed by descent) was *sui juris* and cognizant of all the facts, and not only did not question, but by affirmative acts constantly recognized, his father's ownership, is *held* to bar the action on the ground of laches.

APPEAL from a judgment of the circuit court for Green Lake county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

This is an action in equity to compel the defendants to convey to the plaintiff *Havenor* a certain lot and store building thereon in the city of Berlin, Wisconsin. The plaintiff claims as the only son and heir at law of one Mary J. Pipher, deceased. The complaint alleges, in substance, that on the 25th of December, 1870, at Berlin, Mary J. Pipher (then Mary J. Havenor) was married to one Wilson Pipher, and remained his wife until December 18, 1897, when he died intestate; that at the time of his death Wilson Pipher owned the real estate in suit; that he had no children, and that Mary J. Pipher was his sole heir at law; that Mary J. Pipher died March 17, 1898, intestate, and that the plaintiff *Havenor* is her only son and heir at law, and the plaintiff *McClelland* the duly appointed and qualified administrator of her estate; that on the 16th of December, 1870 (nine days before the marriage), Wilson Pipher negotiated with the firm of Bellis & Hathaway for the purchase of the real estate in question, which was then owned by them, and that such negotiations resulted in an agreement dated on such last named date to buy said real estate for the sum of $5,700, of which sum $1,000 was to be paid down, and the balance in semi-annual payments of $500 each, with ten per cent. interest; that at the same time Wilson Pipher purchased of Bellis & Hathaway a stock of merchandise and some fixtures and household goods in the store building for the sum of $3,050, upon credit, and it was agreed that said Wilson

Pipher should give two notes of the defendant *John Pipher* for said purchase of personal property, each for the sum of $1,500, due respectively one and two years from date; that it was agreed between Wilson and *John Pipher* that, in order to secure *John Pipher* for his liability upon said notes, he should take the contract for the purchase of the real estate in his own name, and that pursuant to such arrangement *John Pipher* gave said notes, and Bellis & Hathaway made said contract for the conveyance of said real estate to said *John Pipher;* that thereupon Wilson Pipher took possession of said real estate and personal property, and continuously occupied said real estate as his homestead up to the time of his death; that he paid said sum of $3,000 with his own funds, and that the first payment of $1,000 on the real estate was made by him with the money of Mary J. Pipher, and that the balance of the purchase money of said real estate was thereafter paid, and that said Mary J. Pipher paid $4,500 thereon, and that it was understood between Wilson Pipher and Mary J. Pipher that the deed to said real estate should be taken in the name of Mary J. Pipher; that upon the payment of all of the purchase money of said real estate said Bellis & Hathaway, on the 16th of December, 1874, executed a warranty deed, running to *John Pipher*, of said real estate, but said deed was never delivered to *John Pipher*, but was delivered to Wilson Pipher, and by him recorded, and never came into the possession of *John Pipher* until after Wilson's death, and that it was in fact executed for the use and benefit of Wilson Pipher; that *John Pipher* held title to said premises during the lifetime of said Wilson Pipher, but had no actual interest therein, and did not claim to be the owner thereof, and that the said Wilson Pipher was at the time of his death the equitable owner of said premises; that *John Pipher* now claims to be the owner of said premises, and denies the right of said Wilson Pipher, and of said Mary J. Pipher as heir at law of

Wilson Pipher, therein; that on the 6th of January, 1898, *John Pipher* deeded said premises, without consideration, to the defendants *Winter* and *Johnston*, reserving to himself a life interest therein, and that said defendants now claim to be absolute owners thereof; that the building on said premises consists of a store building and living rooms, and that said defendants, immediately on the death of Wilson Pipher, took possession of the same, and still remain in possession thereof, and that the full rental value of said property is $600 per year, and the value thereof at least $6,000; that the plaintiffs have no adequate remedy at law. Wherefore judgment was prayed that the defendants convey said premises to the plaintiff *Havenor*, and that a receiver be appointed to collect the rents thereof during the pendency of this action, and other equitable relief be given.

The defendants, by their answers, alleged, in substance, that the defendant *John Pipher* purchased said premises and paid for the same with his own moneys, and thus became the absolute owner thereof, and denied all equities either in Wilson Pipher, or Mary Pipher, or the plaintiffs in this action.

The action was tried by the court without a jury, and the testimony was somewhat voluminous. Many facts were undisputed.

The evidence showed that in the fall of 1870 Wilson Pipher, who was then living in the city of Berlin, was out of business, and did not have any property, so far as known. His father, the defendant *John Pipher*, was a farmer of means, living near Horicon. Bellis & Hathaway owned the real estate in question, on which there was a building, and they had therein a stock of goods and fixtures, and operated a saloon and restaurant and sporting goods store. Wilson Pipher negotiated with them to buy the property and business, the result of which negotiation was that *John Pipher*, the father, came to Berlin, and a written contract

was made by Bellis & Hathaway on the 16th of December, 1870, to sell said real estate to *John Pipher* for $5,700 as in the complaint alleged. At the same time the goods and other personal property in the store were sold by Bellis & Hathaway to Wilson Pipher, and *John Pipher's* notes taken in payment, and Wilson Pipher went into possession of the real estate, and began operating the business. At the time of this purchase Mary J. Havenor was also living in the city of Berlin doing a small millinery business, and not possessing any considerable means, so far as known. On the 25th of December, 1870, Mrs. Havenor and Wilson Pipher were married. The evidence does not show the volume of business done by either of them, but Mrs. Pipher continued to transact her millinery business for some years, and the plaintiff transacted the saloon and restaurant business, and they lived over the store upon the premises in question. The notes given on the purchase of the personal property, as well as the deferred payments provided for in the contract for the sale of the real estate, were all paid prior to December, 1874. Owing to a difficulty, which occurred immediately after the sale of the restaurant, between Wilson Pipher and Bellis & Hathaway, none of the payments were made to Bellis & Hathaway personally by the Piphers, but they were all made through Mr. T. C. Ryan, a lawyer of Wausau, then residing at Berlin. The moneys were brought to Mr. Ryan by either Mr. or Mrs. Pipher, and taken by him to Bellis & Hathaway, and indorsed upon the contract. In December, 1874, when all the money had been paid, Wilson Pipher requested Mr. Ryan to obtain from Bellis & Hathaway a deed of the premises in the name of Mary J. Pipher, but Bellis & Hathaway refused to make such a deed, because their contract ran to *John Pipher*, so a deed was made to *John Pipher*, and delivered to Wilson Pipher, who immediately recorded it. Mrs. Pipher was informed that a deed had been made to *John Pipher* within

a week after it had been made. There is little, if any, evidence to show who furnished the moneys to make the deferred payments, save the fact that the moneys were brought to Mr. Ryan by either Wilson Pipher or Mary Pipher. The defendant *John Pipher*, an old gentleman now eighty-five years of age and evidently very feeble, testified that he paid the entire purchase price of the land; and there is no direct evidence to the contrary, except that one witness testified that *John Pipher* told him that Mrs. Pipher paid the first $1,000 on the land. In the year 1883, Wilson Pipher and Mary J. Pipher had difficulties, and separated, but no divorce was obtained. There is testimony tending to show that Wilson Pipher then paid to Mary J. Pipher $4,500, which was considered to be an equitable division of the property of Wilson. Wilson Pipher continued to live upon the property and conduct the business until his death. During all the time, and after the deed of the property was made in 1874, the real estate was kept insured in the name of *John Pipher*. It was also assessed to *John Pipher*, and the tax receipts made out in his name. No step was, however, taken by Wilson Pipher to obtain the title to the premises during his lifetime, and this suit was commenced after his death. There was considerable evidence on both sides as to admissions made by Wilson Pipher to the effect that his father owned the premises and as to admissions made by *John Pipher* to the effect that the premises belonged to Wilson.

The court found, in effect, that the purchase price of the real estate was all paid by *John Pipher*, that the deed from Bellis & Hathaway to *John Pipher* was executed with the knowledge and consent of Wilson Pipher, and that Mary J. Pipher had full knowledge and information at or about the time of the execution of the deed that the same was executed to *John Pipher*, and had knowledge of all the other facts; that at the time of the separation of Wilson Pipher and Mary Pipher in 1883 they divided the estate, both real

and personal, by mutual agreement and consent, and Wilson Pipher paid to Mary the sum of $4,500.

As conclusions of law the court found that this action was stale, and that the plaintiff, and those through whom he claims, were guilty of laches; that the deed to *John Pipher* was not a mortgage; that on the plaintiff's own showing he is subject to the provisions of sec. 2077, Stats. 1898; that *John Pipher* became the absolute owner of said premises by virtue of his deed; and that at the time of the commencement of this action the defendants *Mrs. Winter* and *Elizabeth Johnston* are such owners, subject to the life estate of *John Pipher*.

Upon these findings the complaint was dismissed, and the plaintiffs appeal.

For the appellants there was a brief signed by *W. J. Turner*, of counsel, and *John J. Wood* and *W. J. & J. H. Turner*, attorneys, and a brief in reply and oral argument by *W. J. Turner*. They contended, *inter alia*, that the deed was never delivered to *John Pipher*, consequently no title passed to him. *Barns v. Hatch*, 3 N. H. 304; *Herbert v. Herbert*, 12 Am. Dec. 192; *Jackson v. Phipps*, 12 Johns. 418; *Maynard v. Maynard*, 10 Mass. 456. The act of recording does not amount to a delivery. *Maynard v. Maynard*, 10 Mass. 456; *Kingsbury v. Burnside*, 58 Ill. 310, 324. A trustee cannot set up laches against his *cestui que trust* until after the trustee has repudiated the trust and assumed possession as an adverse claimant; and the statute of limitations does not run against a party in possession. Perry, Trusts (3d ed.), secs. 863 *et seq.*, 868; *Ruckman v. Cory*, 129 U. S. 387; *Coffee v. Emigh*, 15 Colo. 184; *Bragg v. Olson*, 128 Ill. 540; *Fawcett v. Fawcett*, 85 Wis. 332, 336, 338; *Taylor v. Hill*, 86 Wis. 99.

For the respondents there was a brief by *Perry Niskern*, attorney, and *Thompsons, Hollister & Pinkerton*, of counsel, and oral argument by *A. E. Thompson*.

WINSLOW, J. If the fact be, as found by the trial court, that *John Pipher* paid the entire purchase price of the real estate in question himself, it must necessarily follow that the judgment below must be affirmed. Upon this point the testimony was necessarily quite meager on account of the death of both Wilson Pipher and his wife; but *John Pipher* testified directly that he paid the purchase price of the land, and there was very little, if any, competent testimony to the contrary, except as to one or two vague admissions said to have been made by *John Pipher* in conversations many years since. When the facts and inherent probabilities are considered, they seem to confirm the conclusion of the court. *John Pipher* was a man of means. Neither Wilson Pipher nor his wife had any means when the purchase was made. Their only way of procuring money was by the prosecution of a small restaurant and saloon business and a small millinery business. That they could have made sufficient profit out of these enterprises to pay out $8,750 inside of four years, with ten per cent. interest, is well-nigh incredible; and if they had paid it, or a greater part of it, why did they not at once insist on having the title transferred to them? Certainly we cannot say that the finding of the court on this point is contrary to the clear preponderance of the evidence.

Starting from this fact, the whole case of the plaintiff falls to the ground. The plaintiff claims under the right, if any, of Wilson Pipher. If Wilson Pipher had any right in his lifetime to have the title of the land put in his own name on the theory that the deed was in fact a mortgage, he would assuredly have been obliged to pay the advances which *John* had made to purchase the land. No offer to do that has ever been made, nor is it made in the present case. The fact that *John Pipher* paid the entire purchase price also disposes of any claim that the land was held by *John* for the use of or in trust for Wilson, regardless of the pro-

visions of sec. 2077, Stats. 1898, which section would seem fatal to any claim that the title was held in trust, whatever the fact be as to the payment of the consideration. No question as to the transfer of a homestead without the signature of the wife is in the case, because no such transfer has been attempted.

Furthermore, the defense of laches in asserting any right is insurmountable. For twenty-three years Wilson Pipher, under whom plaintiff claims, allowed the title to remain in his father, not only without questioning, but constantly recognizing, his father's ownership by affirmative acts. The case is rare where, after such a delay, during which witnesses have died and testimony has become effaced from the memory of those remaining, a court of equity will entertain an action to set aside a legal title, when the parties have been at all times *sui juris* and cognizant of all the facts.

By the Court.— Judgment affirmed.

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McElroy and another, Respondents, vs. The Minnesota Percheron Horse Company, Appellant.

January 15 — February 1, 1901.

Appealable orders: Abuse of discretion: Jurisdiction: Duplicity in appeal.

1. On an appeal to this court from an order made upon a summary application after judgment, the only complaint being that the lower court abused its discretion, the jurisdiction of this court depends upon whether there was such abuse. The proper practice is to reverse the order appealed from if it is found to be the result of an abuse of judicial discretion; otherwise, to dismiss the appeal.
2. If a case be made to obtain the favor of the court, and all the material statements relied upon to secure such favor be denied under oath, or explained, or the effect thereof displaced by other sworn statements, this court cannot say that a refusal to grant such favor was an abuse of judicial discretion.

3. Sec. 3049, Stats. 1898, which allows a single appeal to embrace both an appealable order and the judgment in the action, is not limited to cases in which the two can be disposed of together in this court. [Syllabus by MARSHALL, J.]

APPEAL from an order and a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Appeal from order dismissed; judgment affirmed.*

Appeal from an order refusing to extend the time for settling a bill of exceptions, and from a judgment in the action. The judgment was perfected June 21, 1898. On the same day notice of the entry of such judgment was served on defendant's attorneys. On June 9, 1900, a motion was made on the part of defendant to settle a bill of exceptions, and on June 13th thereafter such motion was finally determined. Two years had then run from the time the judgment was entered, but not from the time it was perfected by the insertion of the taxed costs therein. On June 15th, after the denial of the motion, an appeal from the order denying the same, and from the judgment, was taken to this court, the appeals being united. On the hearing of the motion it was supported by several affidavits and opposed by several. Those in support of the motion showed a good ground for granting it, and those in opposition thereto denied or explained the statements in the moving papers indicating such ground. Respondents moved this court to dismiss the appeal because the order was discretionary and the appeal double.

For the appellant the cause was submitted on a brief by *Felker, Stewart & Felker*, attorneys, and *A. E. Thompson*, of counsel, and a separate brief on the motion to dismiss by *Thompsons, Hollister & Pinkerton.*

For the respondents there was a brief by *Barbers & Beglinger*, and oral argument by *Fred. Beglinger.* They argued, among other things, that although sec. 3049, Stats. 1898, permits the joinder of an appeal from a judgment with an

appeal from an appealable order, this should be held to apply only when the two can be disposed of together, either because error in one will have the effect of reversing both, or when the errors in both appear at the same time in the record. On this appeal that is not the case. Even though the order is reversed, that of itself will not affect the judgment. The record would first have to be returned to the circuit court, proceedings there had for the settlement of a bill of exceptions, and the record again returned to this court. As the record now stands it is admitted that the judgment is free from error.

MARSHALL, J. Where the only objection to an appeal from an order is that it was within the discretionary power of the trial court to grant or refuse it, and the order is one of a class of orders appealable by statute, this court must examine the record to see whether there was an abuse of discretion or not; and except in case of an order granting, refusing, or modifying an injunction, if no such abuse be discovered, the appeal must be dismissed. In short, in such a case jurisdiction of this court to entertain the appeal for the purpose of the entry of an order in the cause, depends upon whether the order appealed from was the result of an abuse of judicial discretion.

The idea that the court may obtain jurisdiction for the purpose of determining whether the lower court exceeded its power in a discretionary matter and give the proper relief if such abuse be discovered, or lose such jurisdiction if there be no such discovery, so as to be powerless in that event to affirm the order appealed from, is not easy of satisfactory explanation. The rule in that regard, however, has been too long established to be now open to question. *Wood v. Blythe*, 42 Wis. 300, upon which respondents rely, is in harmony with such rule. The order there was held not appealable because there was no abuse of discretion. In

Jones v. Walker, 22 Wis. 220, the following language on the subject was used: "It is familiar, that orders resting in the discretion of the court below to make or refuse, are not reviewable by appeal. But it is further held that when, in such cases, the court abuses its discretion, its action will be reviewed. And this is not inconsistent with the former proposition; because, when the court abuses its discretion, it goes beyond any discretionary powers that were intrusted to it, and it cannot be said that the order was within its discretion." The quoted language, in view of the statutes as they now stand, must be limited to such orders as are mentioned in the first paragraph. To the same effect are: *Crerar v. M. & St. P. R. Co.* 35 Wis. 67; *Lusk v. Galloway*, 52 Wis. 164; *McCarville v. Boyle*, 89 Wis. 651; *Adamson v. Raymer*, 94 Wis. 243, 250; *O'Connell v. Smith*, 101 Wis. 68. The appeal was entertained in *Spensley v. Janesville C. M. Co.* 62 Wis. 549, and upon reaching the conclusion that there was no abuse of discretion in making the order the court affirmed it. Attention was called to that departure from the settled practice, in *McCarville v. Boyle, supra.* There was a like departure very recently in *Schluckebier v. Babcock*, 104 Wis. 293. There were like departures much earlier than *Spensley v. Janesville C. M. Co.* See *Kennedy v. Waugh*, 23 Wis. 468; *Landon v. Burke*, 33 Wis. 452. There are probably other cases of the kind, but evidently there was no intention in either instance to change the practice. In neither was the correct practice a subject for discussion or decision; while in a number of the cases cited, where it was held that the court only obtains jurisdiction on an appeal from a discretionary order for the purpose of determining whether there was an abuse of judicial discretion and must dismiss the appeal if no such abuse be discovered, the practice question was fully considered and decided.

It is a matter of very little practical importance, however, to the parties to an appeal, which method is adopted

in disposing of it under the circumstances discussed, since the result as to costs against the losing party, and as to subsequent proceedings, is the same whether the appeal be dismissed because the order was so clearly right as not to be open to review, or it be formally affirmed on that ground. *Noonan v. Orton*, 30 Wis. 609. However, harmony with the rule early established, and which the court has evidently intended to follow at all times, requires us to hold that, as regards a discretionary order, "appealability depends on abuse of discretion: if there be such abuse the order is appealable," and the order should be affirmed; "but if there be no abuse, then it is not appealable and the appeal should be dismissed."

We are not unmindful of the fact that in *Fairchild v. Dean*, 13 Wis. 329, it was said that the remedy is not by appeal where the court abuses its discretionary power; but, as we have seen, that case has never been followed. The contrary is well established here, where the order belongs to any of the classes of appealable orders, which this does, being an order entered on a summary application after judgment, within subd. 2, sec. 3069, Stats. 1898.

We have not overlooked the point made by appellant's counsel, that the order before us was grounded on an error of law as to the time when the right of appeal from the judgment ended, and not on the exercise of judgment as to whether justice required the favor asked. It is conceded that there is nothing in the record upon which the contention can be considered. The order indicates that it was the judicial conclusion reached upon a strong case made by appellant excusing its neglect to seasonably settle the bill of exceptions, and a case made by respondents showing that the statements relied upon as such excuse were false in part and otherwise were not entitled to be considered sufficient. We cannot go outside of the order and the papers therein referred to, upon which it was made. We are unable to dis-

cover any abuse of judicial discretion in the determination complained of. We shall not incumber this opinion by stating the leading allegations of the various affidavits that support that conclusion. It is sufficient to say that all the sworn statements made in support of the motion upon which the order was grounded were, under oath, denied on the other side, or explained or neutralized by other statements. The best that can be said in appellant's behalf is that, looking at the moving papers alone, a good case was made for the favor asked, but that an equally good case was made by the opposing affidavits for denying such favor. In that situation it would be highly improper to disturb the decision of the trial court.

It is further contended that there is duplicity in the appeal. That cannot be sustained. The statute (sec. 3049, Stats. 1898) allows an appeal from an order to be coupled with an appeal from the judgment in the action when the order by itself is appealable. There is no ambiguity in the language granting the right. The words are plain. They do not admit of any exception to their obvious meaning, suggested by respondents' counsel, or any other that we are now aware of. It follows that, if we were to hold that the order was appealable because of an abuse of judicial discretion, the appeal from the judgment could not be dismissed.

No error is assigned, going to the justice of the judgment on the record as it now stands. It is admitted that, without a bill of exceptions, no error exists that can work a reversal of it. Therefore the appeal as to the order must be dismissed, and the judgment appealed from must be affirmed.

By the Court.—So ordered. It is further ordered that the appeal must be considered as single for the purpose of taxing costs.

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WAMBOLD and another, Respondents, vs. GEHRING and another, imp., Appellants.

January 16 — February 1, 1901.

Mechanics' liens: Subcontractors: Sufficiency of notice: Building contract: "Extras:" Waiver.

1. A subcontractors' notice of a claim for a lien, which complies with all the requirements of sec. 3315, Stats. 1898, is not rendered insufficient by a superfluous statement therein that the owner of the property expressly agreed to become personally responsible to the subcontractors for their work.
2. A stipulation in a building contract that "no extras will be allowed unless ordered by the owner in writing," is waived by the owner requesting a subcontractor to do certain extra work and personally supervising it during its progress.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

The defendant *William Gehring* was the owner of a building upon which he desired certain repairs to be made. In the month of August, 1896, he entered into a contract with Louis Weber to do such work. The specifications provided, among other things, that "no extras will be allowed unless ordered by the owner in writing." One item of the work let to Weber was a job of plumbing, gas fitting, etc. Weber sublet the contract to do this work to W. D. Ferguson & Co. for $275. Soon after beginning the work, the latter firm dissolved, and the plaintiffs succeeded to its assets and privileges, including the contract with Weber. The plaintiffs finished and completed said work, and at the same time, at the request of *Gehring*, performed extra work. Within the time required by law the plaintiffs served a notice upon *Gehring* of their subcontractors' lien, under sec. 3315, Stats. 1898. The sufficiency of this notice is challenged. It contained a description of the property, set out the contract between Weber and Ferguson & Co., and plaintiffs' succes-

sion to the rights of that firm, and a completion of the work. It also stated that *Gehring* agreed to pay Ferguson & Co. for the work done under the original contract, and claimed a lien for a balance due of $320.02, according to a bill of particulars attached. This bill set out the amount due on the original contract, and a claim for extra work, consisting of a large number of items. The amount not being paid, plaintiffs began this action to enforce their lien. The defendants *Gehring* answered, setting up a counterclaim for inferior work and materials.

The case was tried by a referee, who made findings for plaintiffs. He found a performance of the original contract, but deducted all payments therefrom, and, in addition, the sum of $45 for defective work and materials, leaving a balance due plaintiffs of $105. He also found that plaintiffs performed extra work at *Gehring's* request, amounting to $104.54. Upon due exceptions the case was brought before the circuit court. A full hearing was had, and in a written opinion of some length the court affirmed the findings of the referee. The defendants *Gehring* bring this appeal.

Humphrey Pierce, for the appellants.

J. C. Kerwin, for the respondents.

BARDEEN, J. The objections to the sufficiency of the notice served by the plaintiffs, urged by the defendants, are purely technical, and are entitled to but little weight. The notice, in addition to a statement of the contract between Weber and Ferguson & Co., and plaintiffs' succession to the latter's rights, states that the defendant *William Gehring* expressly agreed to become personally responsible for the price of such work. It is difficult to see how defendants could have been prejudiced or misled by that statement. This is a suit in equity. The substantial questions were: Were plaintiffs employed by Weber? Was the work done? and How much is the amount due? The notice served amply

met all the requirements of the statute, and the fact that superfluous matters were included therein did not injure the defendants in the slightest degree. Nor are we able to discover any fatal defect in the petition for a lien. It is unnecessary to review it at length. We have considered all the objections urged by defendants, and by reference to the petition printed at length in the supplemental case we are satisfied that the trial court arrived at a correct conclusion.

A further contention is that the evidence does not support the conclusion as to extra work. Certainly, there is evidence tending in that direction. It may not be overwhelming or so absolutely convincing as to leave no possible doubt of the fact. Still if the question were open and free from original decision, we should incline towards the conclusion reached by the referee and trial court. The provisions in the contract regarding extra work were binding upon the parties, but might be varied, waived, or disregarded by them. It is virtually conceded that the plans and specifications did not include the soft-water tank or the sheet-lead fittings, which were the items allowed by the referee. The defendant was informed that such was the case. He then told the plumber to go ahead and put them in, and advised with reference to the work while it was being done. The referee found that this work had nothing to do with the contract with Weber, but was ordered done by the defendant. The stipulation in the contract regarding extra work would not prevent plaintiffs from making a new and independent agreement with defendant for work outside of the contract. A personal request by defendant that plaintiffs do this work, and his personal supervision of it during its progress, is a clear waiver of the terms of the original contract, and distinguishes this case from *Coorsen v. Ziehl*, 103 Wis. 381.

The other objections urged are not considered of sufficient importance to require discussion in detail.

By the Court.— Judgment is affirmed.

SCHEER, Appellant, vs. KRIESEL, Respondent.

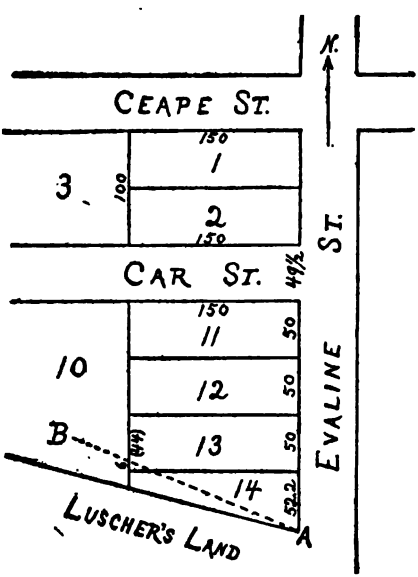
January 16 — February 1, 1901.

Boundaries: Apportionment of shortage in line: Fences: Trespass: Punitory damages.

A shortage in the line bounding several lots on one side having been found by a surveyor and by him apportioned between the lots, one lotowner, the plaintiff, set his fence accordingly upon land claimed by defendant, the owner of the adjoining lot, and the latter removed it by force. It appeared that by any theory of apportionment of the shortage the fence was either upon the line between the lots or wholly upon plaintiff's lot. *Held*, that the defendant was guilty of trespass in removing it, but, having acted in good faith, is not liable for punitory damages.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Reversed.*

Plaintiff was the owner of lot 13, and defendant of lot 12, in Gruenhagen's subdivision of certain land in Oshkosh. The recorded plat of that subdivision was made in 1866, and the material parts are portrayed by the solid lines and figures below:



There was no evidence of the actual location on the ground of any of the lines of that plat, except the exterior boundaries, namely, the north line of the plat, being the south side of Ceape street, and the southerly line of the plat, being the northerly line of Luscher's land. The location of those lines as they existed in 1866 was established. On the plat the lines of the lots fronting on Evaline street were apparently parallel. There was no dispute that, as the result of surveys, the line bounding those lots on the west was found to fall short, and that the south line of the plat in fact ran substantially in accordance with the dotted line, A B, so as to leave no frontage on that west line pertaining to lot 14, and only forty-four feet pertaining to lot 13, if the east and west lines were run parallel. In other words, the true south line infringed upon plaintiff's lot, if the same were surveyed by parallel lines, a distance of six feet on the back end. The east line of those lots was found to substantially correspond with the measurements indicated on the plat.

In 1894 the plaintiff procured a survey to be made by the city engineer, who found the shortage in question, ignored the disappearance of the west line of lot 14, called the total shortage six feet, and divided it between the three lots south of Car street, deducting two feet from each lot, and allowing as a back or west line to each forty-eight feet. Plaintiff in 1896 accordingly set his north fence at the west end forty-eight feet from the Luscher line, and ran the same diagonally towards the northeast corner of his lot. Defendant, with force and arms, tore up the fence and threw it over on plaintiff's lot, whereupon this action in trespass was brought. The jury returned a special verdict in which they fixed plaintiff's compensatory damages at eight dollars, punitory damages at three dollars, and found that the fence was built on the line established by plaintiff's surveyor. The sole question considered was whether that fence was upon defendant's land as matter of law, resulting

from the facts above stated. The court decided in the affirmative, and rendered judgment for the defendant, from which the plaintiff appeals.

For the appellant there was a brief by *Barbers & Beglinger*, and oral argument by *Fred. Beglinger*.

For the respondent the cause was submitted on the brief of *W. W. Waterhouse*.

DODGE, J. The trial court held that the surveyor's method of ascertaining the width on their west lines of the several lots was erroneous, in that he apportioned the shortage of six feet only among the three lots south of Car street (lots 11, 12, and 13), whereas he should have apportioned that shortage throughout the whole line from Ceape street to Mrs. Luscher's land, which (Car street being substantially the width of a lot) would have divided the shortage by six, instead of by three, whence it would result that only one foot, instead of two, should be taken off each lot; and hence the court concluded that the point marked by the surveyor for the northwest corner of lot 13 was one foot too far north. We need not discuss the legal correctness of the court's view as to the apportionment of this shortage, since, assuming it to be correct, his conclusion is erroneous. His logic is correct up to the point that such apportionment justifies a deduction of only one foot from each lot, which would entitle each to forty-nine feet; but that is true with reference to the plaintiff's lot 13 as well as to any of the others, and the court's conclusion leaves the plaintiff but forty-seven feet, instead of forty-nine. The slightest reflection, or, in lieu thereof, an experiment upon a diagram giving to each of the lots in the entire plat forty-nine feet on the west line, will show that such apportionment would locate plaintiff's northwest corner one foot further north than the surveyor had located it. In no other way could he be given the forty-

nine feet to which he would be entitled, for the Luscher fence is an impregnable obstacle to extending his property further south. This being so, of course the fence, instead of being on the true line between plaintiff and defendant, was one foot within the plaintiff's premises, and defendant was guilty of trespass in entering thereon and removing the fence.

Some suggestion is made by the court that lot 14, which on the plat has perhaps eight or ten feet of west line, is also entitled to be preserved in its outlines, and to have a westerly line accorded to it, diminished by its due proportion of the shortage. If that be so, clearly all of the lines of the lots would be crowded some eight feet still further north. In brief, any theory of apportionment of the shortage in the west line of the lots fronting on Evaline street results in justifying a location for plaintiff's northwest corner at least as far north as where he built his fence, and the tearing up of the same was a trespass. That fact being undisputed, and the jury having found all of the other necessary facts, judgment should have been rendered for the plaintiff for the amount of the compensatory damages found. Defendant's good faith in believing his lot invaded by the fence is not impugned, and he should not suffer punitory damages.

By the Court.—Judgment is reversed, and cause remanded with directions to enter judgment in favor of the plaintiff for the amount of compensatory damages found by the verdict.

DAVIES, Executor, Respondent, vs. DAVIES, Respondent, and DAVIES, by guardian *ad litem*, Appellant.

109 129
113 237

109 129
116 306

January 16—February 1, 1901.

Wills: Construction: "In trust:" Beneficial interest.

By one clause of a will drawn by a testator who had devoted almost his entire life to educational work, he gave to his wife, to hold in trust for his infant son and such other parties as might be named in the will, all his property, of the value of about $21,000, including his homestead worth $8,000. He also named his wife as executrix of the will and trustee for the purposes therein named, and by another clause "devised as aforesaid" all his property to his said executor and trustee, to provide for the care and maintenance of said son and of such other children (if any should be born) as might survive him, and directed that when said son attained his professional degree she assign to him such sum out of the proceeds of the estate as might be of help in starting him in the practice of his profession, and at the same time be within the limits of her ability to relinquish from *her estate* without detriment to the other children, if any. He also provided that in case there were other children she might, upon their attaining majority or marrying, assign to them such part of *his estate* as she might deem needful and within her ability to relinquish. There were no other children and no other persons named in the will as objects of the testator's bounty. The relations between the testator and his wife were cordial, and the terms of the will show that he had confidence in her business ability and judgment, but no specific provision was made for her, and she was possessed of no property of her own. *Held*, that the intention of the testator was to bequeath to his wife both the legal estate and the beneficial interest in all his property, subject only to the trust imposed for the benefit of the son.

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This is an action for the construction of a will. On the 22d of January, 1900, Dr. John E. Davies, for many years a professor in the University of Wisconsin, residing in the city of Madison, Wisconsin, died testate, leaving a widow, *Olive M. Davies*, and one child, the appellant, *John E.*

Davies, eight years of age. He left real and personal property to the value of about $21,000, of which his homestead in Madison, valued at $8,000, was a part. The widow had no separate estate or means of support of any kind. The relations between the widow and the deceased had always been cordial. The will was in Dr. Davies's own handwriting, and was made July 22, 1898, while he was away from home, and was as follows:

"Last will and testament of John E. Davies, of the city of Madison, Dane county, Wisconsin, made on the 22d day of July, 1898.

"I hereby publish and declare my last will and testament as follows:

"I give and bequeath to *Olive Merrill Davies*, my lawful wife, to hold in trust for my infant son, *John E. Davies, Jr.*, and such other parties as may be named in this will, all my property of every description in Wisconsin, Illinois, Dakota, and other states, together with all moneys in bank, mortgages, or other securities in my possession, or that of others for me, at the time of my decease.

"I hereby appoint my wife, *Olive Merrill Davies*, of Madison, Wisconsin, county of Dane, as the executor of this, my last will and testament, and trustee for the purposes hereinafter named, without bonds, unless the court shall otherwise order.

"I hereby devise, as aforesaid, all and singular my real estate, including homestead, wherever situated, together with all other properties of which I am possessed at the time of my decease, personal as well as otherwise, to my said executor and trustee, in trust for the following uses and purposes, to wit:

"I direct my said executor and trustee to provide for the care and maintenance and education of my son, *John E. Davies, Jr.*, together with any other children of whom she and I may be possessed at the time of my decease, *not* including Clara May Davies, an adopted, but not legally adopted, child of my former wife. I also direct that she assign to him on the attainment of his professional degree, whether it be medicine, law, science or art, such sum, out of the proceeds of the sale of any real estate then in her possession, as, in her judgment, may be of help to him in start-

ing upon the practice of his profession, and at the same time within the limits of her ability to relinquish from her estate without detriment to the other children of whom she and I may hereafter become possessed. And in case of these other children she may, at the time of their majority, or in case of their marriage, assign to them such parts of my estate or the proceeds thereof as she may deem needful and expedient for them to have, and within her ability to relinquish.

"I hereby nominate and appoint my wife, *Olive Merrill Davies*, the executor of this, my last will and testament, to be the proper person to compound, compromise, and settle any claim, bill, or demand which may be against or in favor of my said estate, and to attend to the payment of my just debts and funeral expenses.

"I hereby commit the guardianship of all my children until they shall respectively attain the age of twenty-one years unto my said wife during her life, if she shall so long continue my widow; and from and after decease or second marriage unto such trusty and esteemed friend or relative as she may decide to be fit to be such guardian of my children.

"I also commit to my said wife, *Olive Merrill Davies*, the guardianship of my aged mother whenever it may be necessary for her to have the care of a guardian. In case my widow, *Olive Merrill Davies*, marries again she shall see that the provisions of this will are faithfully carried out; and in no case shall the property herein alluded to, all or in part, be in any wise subject to the use or control, even temporarily, of her husband, for any purpose whatsoever, but shall be completely and entirely for the purposes hereinbefore mentioned."

This will was duly probated in March, 1900, and the widow, *Olive M. Davies*, duly qualified as executrix, and thereafter commenced this action in the circuit court in her capacity as executrix against herself individually and her son for the construction of the will.

The circuit court, after finding the facts as above stated, held that by the terms of the will the testator bequeathed to his widow both the legal estate and the beneficial interest in and to all his property, subject only to the trust or burden imposed thereon for the benefit of the said *John E.*

Davies, and that, subject to that burden, the widow is to receive, use, and disburse the income of the property of the deceased as her best interests and those of *John E. Davies* demand; that the interest of *John E. Davies*, the son, in the property, is that of a *cestui que trust* of the trust imposed upon the devise or bequest of the property to the said *Olive M. Davies*. Judgment being rendered in accordance with this finding, *John E. Davies*, by his guardian *ad litem*, appeals.

Rufus B. Smith, for the appellant.

For the respondent executrix there was a brief by *Buell & Hanks*, and oral argument by *C. E. Buell*.

For the respondent *Olive M. Davies* there was a brief by *Jones & Stevens*, and oral argument by *B. W. Jones*. They argued, among other things, that if it can be gathered from the will and the surrounding circumstances, with reasonable certainty, that the testator intended to benefit his wife by this will, words may be omitted, or supplied, transposed, or liberally interpreted to effectuate that intent. *In re Donges's Estate*, 103 Wis. 497, 500; *Scott v. West*, 63 Wis. 529, 551; *Webster v. Morris*, 66 Wis. 366, 394; *Baker v. Estate of McLeod*, 79 Wis. 534, 543. As an analogous case, see *Croome v. Croome*, 59 L. T. Rep. 582, 584, affirmed, 61 L. T. Rep. 814.

WINSLOW, J. In construing a will, "the intention of the testator is the thing to be sought, and that, when found satisfactorily evinced by the instrument as a whole, is to govern, notwithstanding any technical or literal meaning of particular clauses to the contrary." *Yearnshaw's Appeal*, 25 Wis. 21. A construction which gives effect to the will, and prevents either total or partial intestacy, is to be preferred. *Lovass v. Olson*, 92 Wis. 616. The circumstances surrounding the testator at the time of execution — such as the condition of his family, and his relations to his relatives, and

the amount and character of his property — should be taken into consideration, so that the interpreter may be placed as nearly as possible in the position occupied by the testator. *Blake v. Hawkins*, 98 U. S. 315.

In view of these well-settled rules the will of Dr. Davies is to be construed. The circumstances surrounding the execution of the will may be briefly stated. The will was not drawn by a lawyer, but by Dr. Davies himself, who had devoted himself for well-nigh his entire life to educational work. He was possessed of a slender property, more than one third of which was composed of his homestead, which was necessarily unproductive. His wife had no property of her own, and had no expectation of acquiring any separate property, but was dependent upon him. The relations between the testator and his wife were cordial, a fact which appears by testimony as well as from the terms of the will itself. The will also demonstrates that the testator had full confidence in his wife's discretion and business ability. He had but one child, a son of tender years, and no one apparently dependent upon him except his wife and this child. All natural inferences would be that he must have intended to provide as far as possible for the wants of both the mother and child.

Bearing these circumstances in mind, we can entertain no reasonable doubt but that the trial court properly construed the will.

It is certainly true that there are no appropriate words in the will which give a beneficial estate in the property to the wife. The devise is to her, "to hold in trust for my infant son," and, again, "I hereby devise *as aforesaid*" all my property "to my said executor and trustee in trust for" the education, maintenance, etc., of my infant son. The words "in trust for" are technical words, and, if to be construed in a technical sense, would convey no beneficial estate to the wife. Had these words been used by a trained law-

yer, the argument that they must receive their true technical meaning would be strong; but here the fact that they were used by a layman, albeit an educated man, is of great importance. The word "trust," in its popular sense, covers many things besides the legal and technical trust. A layman using the word might easily suppose that he was simply expressing thereby his belief or trust that the devisee would cary out his wishes; that in saying that he gave his property to his wife "in trust" to carry out his expressed wishes as to the education and maintenance of his children he was making an absolute gift to her of the property, trusting that she would faithfully carry out those wishes,—in other words, that the property was to be hers, simply burdened with the execution of his expressed desires.

Turning to other parts of the will, we are convinced that such was Dr. Davies's intention. After providing for the education and maintenance of *John*, he directs that when *John* shall have taken his professional degree she then assign to him such sum out of the proceeds of the sale of his real estate "as, in her judgment, may be of help to him in starting upon the practice of his profession, and at the same time within the limits of her ability to relinquish from *her estate* without detriment to the other children of whom she and I may hereafter become possessed." A similar provision calling for gifts to after-born children follows, except that the words "my estate" are used instead of the words "her estate." We have been entirely unable to reconcile these provisions with the idea that *Mrs. Davies* was to possess no beneficial interest in the property, and was simply to act as a trustee, with not a shadow of provision for even her bare support while she was educating and maintaining the child which was the result of their union. The inference that she herself had a beneficial interest in the property is irresistible from the words "her estate" and the other language used. If the intention was that the estate

was to be administered as intestate estate after the trust provisions were fulfilled, or that it was all to go to *John* and the other children, if any, then these provisions would be nugatory, not to say ridiculous. And the unnatural character of such a disposition, which leaves his wife penniless, is a consideration which must have great weight. Nor will it do to say that Dr. Davies probably anticipated that his wife would renounce the provisions of the will and take her share of the estate under the law. The scheme of the will is such, and the amount of the property so small, that it would be evident to any mind that such a course would destroy the entire plan and render the execution of the will practically impossible.

The evident confidence and trust in his wife, which is evidenced throughout the will, lends support to the construction given it by the trial court, while the last clause of the will seems utterly inconsistent with the idea that the widow was to have no beneficial interest in the property, but was simply to be a trustee discharging certain duties.

It must be admitted that the result reached carries the doctrine of construction to a considerable length, but, we believe, not beyond just and wholesome legal conclusions.

By the Court.— Judgment affirmed; taxable costs of the executrix and the appellant to be taxed and paid out of the estate.

109 136
113 *557
109 136
114 264
109 136
117 *377

REHBEIN and others, Appellants, vs. RAHR and another, imp., Respondents.

October 16, 1900 — February 26, 1901.

Banks and banking: Certificate of incorporation: Intent of signers: Who are stockholders: Rescission: Nature and extent of individual liability to creditors: How enforced.

1. The certificate of incorporation of a bank organized under the banking act, upon the recording of which in the office of the register of deeds the signers become a corporation, when filed for record and acted upon must be given full effect, according to its terms, against those who executed it, although such filing may have occurred in contravention of the understanding and directions of some of them; and the obligations thereby incurred by such signers inure to the benefit of all persons dealing with the corporation on the faith of its status as such, though they did not know the names of the incorporators.
2. The intent of the signers of the certificate of incorporation of a bank, and the force and effect of their act, must be determined from the instrument itself, the terms of which cannot be varied or contradicted by parol nor by inference as to the intent or purpose of those executing it; and any ambiguity in the instrument is to be resolved most strongly against the signers, and so as to give some instead of no effect to their acts.
3. Subsecs. 18 and 19 of the banking act (sec. 2024, Stats. 1898) provide that "any number of persons may associate . . . and may become incorporated;" that "such persons . . . shall make a certificate," stating the amount and number of shares of the capital stock and the names of the stockholders; and that upon the recording of such certificate they become a corporation. No other provision requires that any given amount of stock shall have been subscribed before the corporation engages in business. *Held*, that those who constitute the original corporation must be the holders of all the stock thereof, and their relationship as such stockholders arises immediately upon the coming into existence of the corporation.
4. A certificate of incorporation of a bank named "W. R.'s Sons" as the holder of twenty-five shares of stock, and was signed by two of the three sons of W. R. who constituted the firm of W. R.'s Sons. *Held*, that, the firm not being bound thereby, the members sign-

ing the certificate became the holders of the twenty-five shares mentioned, the conclusive presumption being that they intended to bind whom they could within the description adopted.

5. A day or two after the signing of the certificate, one of said signers notified the promoter of the corporation, who held the paper, that they had reconsidered, and declined and refused to become stockholders, but the promoter nevertheless proceeded to file the certificate bearing their names and stating that W. R.'s Sons held twenty-five shares. Subsequently, when he tendered them a certificate of stock, they refused to accept it, and he took it away, but it was never destroyed, and the officers of the bank, in their reports to the state treasurer, included W. R.'s Sons in the list of stockholders. *Held*, that there had been no effective rescission of the agreement of said signers or termination of their status as stockholders.

6. Under subsec. 47 of the banking act (providing that the stockholders in every corporation organized thereunder "shall be individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind"), the individual liability of a stockholder is not, as to creditors, a ratable or proportional liability, but is limited only by the amount of his stock and by the amount of unpaid debts of the corporation. Within those limits it is a primary and absolute liability, upon which any creditor (however small his claim in proportion to the total indebtedness) may sue and recover in full; though to prevent inequality and preference any such creditor must proceed in equity, so that opportunity can be given to all other creditors to share in the fund and the rights of all stockholders to contribution or otherwise may be protected and finally determined.

APPEAL from a judgment of the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *Reversed.*

The T. C. Shove Company, a state banking corporation, having assigned April 12, 1892, plaintiffs, being creditors of said bank to the extent of $2,800 out of an aggregate of about $485,000, brought suit against defendants, nominally impleading with them the corporation and the other stockholders thereof, who, however, were not served with process, they being alleged to be insolvent. The action was brought by plaintiffs for the benefit of the creditors of said

corporation, and to enforce the statutory liability of the defendants *Rahr*, under subsec. 47, sec. 2024 [p. 1537], Stats. 1898, for an additional amount equal to the par value of the stock claimed to have been held by them.

It appeared that in 1884, preliminary to the organization of the Shove Bank by T. C. Shove, theretofore a private banker, these defendants, with their brother, Max Rahr, constituted a business partnership under the name of William Rahr's Sons; that Shove spoke to *William Rahr* about his firm becoming a stockholder for twenty-five shares in the proposed banking corporation; that *William*, after talking with *Reinhardt*, expressed his own and *Reinhardt's* approval of such proposition, and they, at the request of Shove, signed their names to a certificate of incorporation under the bank incorporation statute (now sec. 2024, Stats. 1898), with the understanding, as found by the court, that such signature was only for the purpose of performing their individual part towards constituting the firm of William Rahr's Sons a stockholder, and that, in order to bind the firm, the other member was to subscribe and acknowledge, to accomplish which blanks were left for the name of Max Rahr. The court further found that there was no intent or understanding on the part of any one that *William Rahr* or *Reinhardt Rahr* should, individually or jointly, become contracting parties by virtue of their signatures. Max, on being informed of what they had done, did not approve, and thereupon, a day or two after their signatures had been affixed, *William* notified Shove, who held the paper, that they had reconsidered, and declined and refused to become stockholders. All this was nearly a month before the papers were filed with the register of deeds to create the corporation.

Thereafter, on June 3, 1884, Shove, notwithstanding said notification, did file the certificate in question bearing the names of *William Rahr* and *Reinhardt Rahr*, and specifying

among the list of stockholders "William Rahr's Sons, of Manitowoc, Wis., holds twenty-five shares." Subsequently, about July 1, 1884, Shove brought and tendered to *William Rahr* a certificate of stock for twenty-five shares. *Rahr* refused, saying that the firm had declined to become a stockholder, and would not take it, and persisted in such refusal, although Shove offered to accept the note of the firm for this amount, whereupon Shove took the certificate of stock away. It appears that it was never destroyed, and that the stub in the stock book continued to show certificate No. 16, twenty-five shares, in the name of William Rahr's Sons, although it did not show any signature to the receipt therefor printed on the stub. Thence onward the officers of the bank continued, in their reports to the state treasurer, to include William Rahr's Sons among the list of stockholders, but of none of such facts had the respondents any knowledge. It does not appear that lists of stockholders were at any time after the incorporation filed with the register of deeds.

The insufficiency of the general assets of the bank to pay more than about twenty-nine per cent. of its debts was found. There was evidence that most of the plaintiffs had newspaper information at the time of the incorporation of the bank in 1884 that William Rahr's Sons were stockholders, and plaintiff *Stolze* had seen the reports of the state treasurer from time to time thereafter containing their names, and had examined the record of certificate for incorporation in the register's office. The court found that neither *William Rahr* nor *Reinhardt*, nor both of them, were by the plaintiffs supposed to be holders or owners of any of the capital stock of said bank. There was no evidence as to whether any other creditors had knowledge or information, before the assignment, of any connection of respondents with the bank. The court found as a fact that at none of the times involved did the respondents *William Rahr* or *Reinhardt Rahr*, either jointly or severally, own or hold any of the

capital stock of the insolvent banking company. Judgment was entered dismissing the complaint, from which the plaintiffs appeal.

For the appellants the cause was submitted on the briefs of *Timlin, Glicksman & Conway.*

For the respondents there was a brief by *Nash & Nash*, attorneys, and *F. C. Winkler*, of counsel, and oral argument by *Mr. Winkler.*

DODGE, J. The liability sought to be enforced in this action has been subject to many decisions in this court, the result of which is that it is strictly and distinctively contractual, but contractual not because of express agreement, but because of the statute (Stats. 1898, p. 1537, sec. 2024, subsec. 47): "The stockholders in every corporation or association organized under the provisions of this act shall be individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind." Every individual who brings himself within its terms must be held to have contracted and agreed that he will pay all liabilities under which the bank may at any time labor while he continues that relation, to an amount, however, not exceeding the par value of his stock. The contract is said to be between him and each of the creditors. By reason, however, of the fact that all creditors have an equal right to share in that liability, and that each stockholder has a right that every other shall contribute to defray the aggregate thereof, it has been held that the proper method of enforcement is not through a suit at law by one of such creditors against one or more of such stockholders, but by all creditors against all stockholders who can be brought within the jurisdiction, together with the corporation, as defendants. *Coleman v. White*, 14 Wis. 700; *Finney v. Guy*, 106 Wis. 256; *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624.

Since this contract is implied from the statute, its scope is limited thereby. That statute imposes the liability upon stockholders, and no others. The primary question, therefore,— and, indeed, that most litigated in the present case,— is, Were the respondents stockholders of the defendant corporation? The circuit court evidently faced exactly this proposition, and held that the respondents never became stockholders, predicating his conclusion on one specific finding of fact, namely, that they did not execute the certificate of incorporation. True, they signed their names to it, but he found as fact that the signature was preliminary only, and understood by all parties to be as if not done until consummated by the assent and signature of the third member of the firm of William Rahr's Sons, Max Rahr. Assuming the facts of the transaction to be as found by the court, the first and vital question is whether his conclusion of non-stockholding by these defendants may lawfully be drawn therefrom, notwithstanding the fact that by the filing of the paper bearing their signatures they were apparently shareholders.

It must be conceded that the general rule is perfectly well settled by the decisions of this state that a document which requires delivery to be effectual is wholly ineffectual unless voluntary delivery thereof be made; that otherwise such paper never comes into existence as a legal instrument. This was decided as early as *Everts v. Agnes*, 4 Wis. 343, and has been reiterated in *Beloit & M. R. Co. v. Palmer*, 19 Wis. 574; *Walker v. Ebert*, 29 Wis. 194; *Kellogg v. Steiner*, 29 Wis. 626; *Tisher v. Beckwith*, 30 Wis. 55; *Andrews v. Thayer*, 30 Wis. 228; *Chipman v. Tucker*, 38 Wis. 43; *Hillsdale College v. Thomas*, 40 Wis. 661,— most of which cases deal with the situation where the signer of a paper has left it in the hands of a depositary to be delivered only on certain conditions. If the paper be delivered contrary to those conditions, it is of no force or effect,— never comes into

existence as against the signer, and therefore no rights under the same can be acquired by any one, however innocent, or for value, unless the signer's conduct is so characterized by negligence as to estop him against an innocent holder from denying responsibility upon the paper. The deposit with a reasonably responsible person as a custodian, to deliver only on certain conditions, is held not negligent. *Everts v. Agnes, supra.* Chief Justice DIXON said, in *Walker v. Ebert, supra* (p. 197): "The inquiry in such cases goes back of all questions of negotiability, or of the transfer of the supposed paper to a purchaser for value, before maturity and without notice. It challenges the origin or existence of the paper itself; and the proposition is, to show that it is not in law or in fact what it purports to be, namely, the promissory note of the supposed maker." These remarks were held applicable to a mortgage delivered contrary to instructions, recorded, and transferred for value to an innocent holder. *Chipman v. Tucker, supra.* These cases fully recognize the distinction between an acquisition of possession which the signer has never authorized or assented to, and the inducing of the signer to make or assent to a delivery, by fraud going to the motives moving such assent. In the latter case the paper becomes effectual as a legal document, subject to be defeated by proof of the fraud, unless legal rights of innocent holders for value have intervened; but in the former it is nonexistent; it is as a paper which the maker never signed, or as one which, his signature having been put to it while in his own possession, is purloined from that possession without his negligence. The question whether the recipient of that paper had or had not knowledge, or was or was not fraudulent in receiving the same, is immaterial. *Beloit & M. R. Co. v. Palmer, supra.*

This principle is very old and thoroughly established at common law, and no exception save that of estoppel by negligence had ever been recognized in Wisconsin until *Belden*

v. Hurlbut, 94 Wis. 562, where a contrary rule was applied to a probate bond, largely on the authority of *Dair v. U. S.*, 16 Wall. 1, and *Russell v. Freer*, 56 N. Y. 67, but supported by a large number of other decisions; a distinction being drawn between other documents and such paper as a probate bond, signed by sureties and delivered to the principal obligor or some one acting for him. Such distinction was held to be required on grounds of public policy. It was said that the Wisconsin cases above referred to differ from the case then in hand in that they involve business transactions between man and man only, where the grantee is perfectly able to ascertain and investigate the status of the transaction, and they do not involve the considerations of public policy, and the preservation of the estates of widows and minors, which are strongly set forth in the quotations made from *Dair v. U. S.*, *supra*, and *State v. Peck*, 53 Me. 284. The rule of *Belden v. Hurlbut* has since, without discussion, been applied to a private bond passing between individuals in *New Home S. M. Co. v. Simon*, 104 Wis. 120, 124, the court there saying that bonds are governed by a different rule from other instruments.

The findings in the case at bar disclose a situation which, on the authority of the Wisconsin cases above cited, would probably defeat a promissory note, mortgage, or other like paper, but would not defeat a probate or public bond similarly deposited. The question, then, recurs whether the rule so well established in Wisconsin, that ordinarily a paper shall have no efficacy whatever unless made current by voluntary delivery, is to be subjected to further exception in favor of documents like that before us, which, in order to become valid and effective, was not to be delivered to an adversely interested individual, who was to acquire his rights thereby, but was to be delivered to the public by filing with the register of deeds, upon whom rests no duty to scan or scrutinize the instrument, or to ascertain any of the facts

bearing upon its due execution or upon the authority of him who files it, but merely to receive and give to it apparent, ostensible authenticity and force by spreading it upon the public records.

It would seem that the question, thus stated, answers itself, in the light of the reasons which induced this court to insist on the validity of probate bonds although no voluntary delivery thereof had occurred. Certainly, more duty and opportunity for scrutiny, precaution, and inquiry rests upon the county judge before the acceptance of a bond which shall give existence and authority to an administrator, guardian, or trustee than rests on the register of deeds in accepting and filing articles of incorporation. Again, those who are to be affected thereby, and who are to rely on the state of facts which depends upon the existence of such paper, are even more remote and unable to protect themselves in the case of the establishment of a bank than in the case of the creation of a court officer. They may have no interest until years after the event, and they may well be as helpless, and as entitled to invoke rules of public policy, as are the widows, orphans, or beneficiaries whose property depends upon the sufficiency of the bond. Such reasons lie at the foundation of the policy of this and other states to place about the business of banking extraordinary restrictions and safeguards to minimize as far as possible the grievous results of insolvency. The disturbance of the business world, and the impoverishment of those who rely on the semi-public character of banks for the safe-keeping of their moneys, are considerations which involve so much of public policy and general welfare that they invite and have received the most anxious care at the hands of both legislature and judiciary. By virtue of his bond the county judge confers upon an administrator custody and control of moneys and property of the few people interested in an estate. By virtue of the public record of incorporation papers

the state confers upon a bank in practical effect the custody of the moneys of a whole community, whose members, whatever their right, have practically not the power of ascertaining its safety, but *ex necessitate* rely therefor on the status the state has given it. This comparison leaves no doubt of the duty of a court to adopt for the protection of the latter situation quite as stringent rules as for the former. We are unable, therefore, to escape the conclusion that all the considerations which justified the decision in *Belden v. Hurlbut*, 94 Wis. 562, necessitate the holding that public policy demands that the certificate of incorporation of a bank, when filed and acted on, must be given full effect, according to its terms, against those who execute the same, although its filing may have occurred in contravention of the understanding and directions of some of them. This is on the ground of estoppel, but estoppel *quoad* the state, the benefit of which extends to all those who deal with the corporation on the faith of its status as such; just as the contract which would result from intentional execution and filing of the certificate inures to the benefit of those who deal with the corporation in after years, though they may never have known who were the parties thereto as incorporators, and may never have relied on the fact that any particular person was thereby made liable to them.

From the foregoing it results that all of the signers of the certificate for incorporation of the Shove Banking Company are placed in exactly the same position as if that document had been filed by their direction and with their assent. Upon that attitude, however, it is contended by respondents that the paper itself excludes the idea that *William Rahr* and *Reinhardt Rahr* were to become holders of the entire twenty-five shares of stock, because the stock is listed as to belong to William Rahr's Sons, a firm which they could not bind. The question of their intent, and of the force and effect of their act, must be resolved from the

instrument itself, the terms of which cannot be varied or contradicted by parol nor by inference as to the intention or purpose of those executing. The original force and effect of such instrument is, at the least, to express a contract *by its signers* to take the amount of stock which that certificate declares them to hold. Further, the statute evidently contemplates that the certificate is to be signed by the holders of all of the stock as the corporation is to be originally organized. Stats. 1898, sec. 2024, subsec. 18 (p. 1528), provides that "any number of persons may associate . . . and may become incorporated." Sec. 2024, subsec. 19 (p. 1529): "Such persons . . . shall make a certificate," etc. These provisions leave no doubt that those who are to constitute the original corporation must sign the certificate. But it clearly appears that those who constitute the original corporation must be holders of the capital stock thereof, for the certificate above mentioned is required to state the amount and number of shares of the capital stock and the names and residence of the stockholders. Clearly, this contemplates and requires that the corporation, when created, shall consist of the shareholders already ascertained, and that it shall also consist of "such persons" as make the certificate and thereby "become incorporated." The two classes, shareholders and makers of the certificate, must, of necessity, be identical, in order to give effect to the various calls of this statute. This legislative purpose is rendered the more certain by the fact that in no other manner is any requirement made, as in the case of other corporations, that any given amount of capital stock shall have been subscribed before engaging in business. If this is not what the statute demands, one man, holding one share of stock, may execute and file a certificate, declaring who are the holders of the rest, it is true, but not binding them, and may thus alone "become a body politic and corporate," with all the powers and privileges specified (sec. 2024, subsec. 19, subd. 5),—a result too absurd to be contemplated.

Taking together these two propositions, namely, that the certificate declares that the subscribers have together agreed to take all the stock and the amount which each has agreed to take, and finding that the amount of stock to be held by each of the other signers is specified in the certificate, no interpretation can be adopted other than that *William Rahr* and *Reinhardt Rahr*, who were sons of William Rahr, agreed to become stockholders for the other twenty-five shares in the certificate mentioned. If the contract is ambiguous as to whether by the expression "Wm. Rahr's Sons" is intended those of his sons who have signed, or a partnership consisting of others as well, that ambiguity is to be resolved most strongly against those responsible for it, and so as to give some, instead of no, effect to the acts of the parties. If, by their signatures, the respondents could not constitute the firm a stockholder, it must be presumed that they did not intend to, but did intend to bind whom they could within the description adopted.

Another proposition irresistibly results from the conclusion that the respondents' act in signing the paper was a completed one, namely, that the paper was thereby agreed to be used for the purposes for which the law required it to be executed, and that the act of Shove or any of the other signers of the paper in placing it in the register's office was in accordance with its terms, and thereby created a corporation consisting of the signers as shareholders. That immediately upon the coming into existence of such a corporation all of the signers to this certificate became stockholders therein, is obviously the contemplation of the statute. The organization of banking corporations differs radically, in that respect, from the method prescribed for others. Generally, corporate existence is created by the execution and filing of an instrument by men who may never hold stock, and the relationship of stockholder is created either by the purchase of stock or the subscription

therefor accepted by the corporation. *Badger P. Co. v. Rose*, 95 Wis. 145. In the case of the banking corporation, however, the statute provides that the certificate shall be of actual stockholding, and that statute, upon the filing of the papers so as to constitute the corporation, itself undoubtedly supplied the acceptance, so that the relationship immediately arises. The contract, so soon as the state becomes a party to it by the filing of the certificate, is an executed one. It is not like the promise to marry, which may be effectively broken, but like the contract of marriage, which creates a status irrevocably. 1 Morawetz, Priv. Corp. § 56; *Buffalo & N. Y. C. R. Co. v. Dudley*, 14 N. Y. 336, 346, 355; *Spear v. Crawford*, 14 Wend. 20; *Stanton v. Wilson*, 2 Hill, 153.

Some argument is submitted as to the right or power of these respondents to rescind their contract of subscription, but the question does not present itself for decision, for the present record presents no evidence of any effective rescission. If respondents made any attempt to that end, it could not be effective without consent of their associates and of the corporation, nothing of which is disclosed by the record.

We conclude, therefore, that by the certificate of incorporation, signed by the respondents, and filed with the register, they agreed, with their associates, that it might be used to create a banking corporation, and that upon its creation they should *ipso facto* be and become stockholders therein to the amount of twenty-five shares; that, upon the legal filing of such document, they did become such; that there has been neither rescission of such agreement nor termination of such status; and as a result, that they were, at all times material to their liability, shareholders in such corporation.

Respondents' counsel contend that this suit should not be entertained by a court of equity, because of the trifling interests of the plaintiffs, who hold but $2,800 of claims out of a total of $485,000 proved up in the assignment proceed-

ings. His insistence is that the limit of defendants' liability to each creditor is such proportion of the par of his stock as such creditor's claim bears to the whole amount of debts, and to these plaintiffs, therefore, is only about $14.50, conceding the insolvency of all other stockholders. Appellants insist, however, that defendants are liable to pay the full par value of their stock, $2,500, if the claims of the creditors appearing as plaintiffs at the time of distribution equal or exceed that sum, without regard to whether other creditors exist who do not choose to come in as plaintiffs. This is a very important question, upon which substantially no aid has been given us by counsel further than the assertion of their differing views. Under such circumstances we have hesitated much whether we ought to decide it, but have reached the conclusion that we should do so as essential to disposal of respondents' objection to the entertainment of the suit at all, and also because it must be resolved in rendering final judgment; so that silence now may be productive of much protraction of this litigation by necessitating another appeal, and perhaps a second accounting and judgment.

In adjusting statutory liabilities of stockholders or other officers, where restricted at all, two limits resulting from proportion have at times been insisted on: first, that no stockholder should be held for more than would be his ratable proportion if all stockholders similarly liable responded for their shares; secondly, that stockholders should be liable to any creditor or creditors less than all for no more than would be their liability to the same creditors if all were present and demanding to participate in the shareholders' liability.

The first of these limitations, though not urged here, we have examined so far as we have been able, without finding that it has ever been applied under a statute like ours. Under various statutes which differ from sec. 2024, subsec.

47, by containing the provision that stockholders shall be liable "ratably" or "in proportion to their holdings," such limit has been declared and enforced, but has quite uniformly been ascribed to such differentiating words. In *Crease v. Babcock*, 10 Met. 525, 555, the statute imposed on stockholders individual liability for unpaid bills of a bank in "proportion to the stock they may respectively hold." Under this it was held that the shareholder was liable only for such proportion of the whole indebtedness as his stock bore to the total stock, although some of that total was held by the corporation itself and some by insolvent individuals. In *In re Hollister Bank*, 27 N. Y. 393, the language construed was: "The stockholders shall be individually responsible equally and ratably . . . for the amount of such debt to the extent of their respective shares." The debts ascertained were directed to be apportioned among them "ratably in proportion to their stock." The court, in enforcing the same limit as in the *Crease Case*, pointed out that under an earlier law, substantially identical with sec. 2024, subsec. 47, no such limit could be enforced, but that each stockholder would be liable up to the face of his stock, so far as necessary to satisfy the debts, regardless of the duty of others. These two cases, with others less significant, were cited as support for the decision in *U. S. v. Knox*, 102 U. S. 422, under the national bank act (sec. 5151, R. S. of U. S.): "The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares." This language was held to warrant the rule that each shareholder shall contribute such share of the whole debt found as his stock bears to the total capital stock. That amount could not be increased by reason of the insolvency of other stock-

holders. *First Nat. Bank v. Winona P. Co.* 58 Minn. 167; *Clarke v. Cold Spring O. H. Co.* 58 Minn. 16; *Brundage v. Monumental G. & S. M. Co.* 12 Oreg. 322; *Holmes v. Sherwood*, 16 Fed. Rep. 725; *Umsted v. Buskirk*, 17 Ohio St. 113, 118; *Barrick v. Gifford*, 47 Ohio St. 180; *Herrick v. Wardwell*, 58 Ohio St. 294, 306. On the other hand, liability to the full face of the stock, in the absence of *pro rata* limitation, is apparently sustained by the following authorities, although the question was not very fully debated: *Briggs v. Penniman*, 8 Cow. 387; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Garrison v. Howe*, 17 N. Y. 458. We are satisfied that the latter rule results from a statute such as ours. In the absence of the words therein, "to the amount of their respective share or shares of stock," liability would rest on every stockholder individually for the whole amount of the debts due any plaintiffs. The only limitation upon such liability is the amount of a defendant's stock. The conclusion seems irresistible that he can insist on no other, but must respond as he would be required under the unlimited statute until the limit is reached.

The second theory of limitation, namely, to such proportion of the face of the stock as the plaintiffs' claims bear to all the debts of the corporation, is equally unsupported by any authority which has come to our notice. Substantially all courts, as above stated, have declared this statutory liability to be primary and absolute, a contract debt from each stockholder, for which any creditor might sue and recover in full, but for equitable considerations which have led the courts in many states, including Wisconsin, to hold that, to prevent inequality and preferences, any such creditor must proceed in equity, so that the opportunity can be given to other creditors to share in the fund, if they see fit to demand it, and stockholders' rights to contribution can be protected if they choose. *Coleman v. White*, 14 Wis. 700; *Finney v. Guy*, 106 Wis. 256, and citations; *Whitman v. Oxford Nat. Bank*, 176 U. S. 559, 565.

This holding as to the remedy does not differentiate the liability in those states maintaining it from the liability under similar statutes in states whose courts have allowed enforcement either at law or in equity, notable among which is New York. The stockholder is still bound to any creditors who sue to pay an amount equal to his stock, if necessary to discharge such debts. The creditor must, however, share his right with any others who, on due notice, ask participation. Such is the force of the Wisconsin decisions. The liability, as between the stockholder and creditor, is none the less several because, as between stockholders, it is proportional, nor because, as between creditors, the participation is *pro rata*. *Umsted v. Buskirk*, 17 Ohio St. 113; *Herrick v. Wardwell*, 58 Ohio St. 294.

Confusion upon this subject will be avoided by remembering that in theory all creditors of the corporation are plaintiffs in this action. *Barrick v. Gifford*, 47 Ohio St. 180; *Richmond v. Irons*, 121 U. S. 27, 51. It appearing reasonably certain that the total claims of all such creditors exceed the face of the stock held by the solvent shareholders, it is proper to adjudge full liability against the latter, saving, in the enforcement of any such judgment, the contingency of such full liability not being required. *Gianella v. Bigelow*, 96 Wis. 185. True, after settling the fact and amount of defendants' liability, which may now be done by interlocutory judgment (sec. 2883, Stats. 1898), it will remain for the court to ascertain the exact personnel of the plaintiffs, and their relative rights in the fund. Sec. 3227, Stats. 1898, points out a method. When that is done, however, it is conclusive both in favor of and against all parties. *Richmond v. Irons*, 121 U. S. 66. Thereafter, for the purpose of enforcing or sharing in the stockholders' obligation, no one is a creditor save those who have joined as plaintiffs. They are thereby conclusively adjudged to be all the creditors of the corporation in practical effect. Defendants will have

the full benefit of such adjudication, for no other creditor can ever proceed against them. *Finney v. Guy*, 106 Wis. 256; *Eau Claire Nat. Bank v. Benson*, 106 Wis. 624. No reason is apparent why the defendants should not, therefore, be held to the same liability as if the fact so adjudicated were literally true, and be compelled to pay in up to the full limit of their stock holdings, if the claims of the creditors ultimately appearing equal or exceed that amount.

The views above expressed of course result in the conclusion that the judgment dismissing the complaint must be reversed, and that the defendants must be held liable as holders of shares of the par value of $2,500. The circuit court must proceed to judgment giving effect to such liability. In so doing it may meet complications and conflict of rights demanding the broadest of its equity powers, and taxing the elasticity of equitable procedure and administration. The final judgment in a case of this kind is drastic in its results, and forecloses important rights on both sides. It excludes all creditors not parties to it from any share in the fund realized from the liability adjudged, and also excludes all creditors from any demand upon any omitted stockholders. *Finney v. Guy, supra; Eau Claire Nat. Bank v. Benson, supra.* Further, it excludes the defendants who may thereby be compelled to pay from any claim for contribution against such omitted stockholders, equally liable, whether within the jurisdiction or not. *Foster v. Posson*, 105 Wis. 99. The most ample opportunity should, therefore, be extended, so far as consistent with orderly practice, to bring in all parties whose rights or liabilities may be affected. The extinguishment of rights of nonplaintiff creditors is a deprivation of property which they should suffer only after due process of law, namely, a notice so framed and served as to fully warn them of their rights and the peril thereto if they neglect the opportunity to join in the suit. The ordinary practice of courts of equity in such circumstances is but confirmed by

sec. 3227. The election of the present plaintiffs to omit from the action any stockholders because of their insolvency, or for any other reason, should not preclude any of the other parties nor the court from bringing them within its jurisdiction if their presence can facilitate protection of any rights of contribution or otherwise. Present insolvency is not necessarily conclusive of futility in an adjudication of the rights and liabilities of the parties, nor of the ultimate impossibility of their enforcement, if not finally cut off by the judgment. Again, the defendants may themselves be creditors either by original dealing with the bank or by assignment of or subrogation to the claims of others. Their rights, if any, in that respect, can and should be protected. *Commercial Bank v. Azotine Mfg. Co.* 66 Minn. 413; *Killen v. Barnes*, 106 Wis. 546. Interests held by the same individual on both sides of the line separating plaintiffs from defendants offer no obstruction to complete justice in courts of equity. *Spaulding v. North Milwaukee T. S. Co.* 106 Wis. 481.

By the Court.—Judgment reversed, and cause remanded for further proceedings according to law.

109	154
110	*588
109	154
112	[4]249
112	[1]631
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h116	43

REMINGTON, Appellant, vs. EASTERN RAILWAY COMPANY OF MINNESOTA and another, Respondents.

December 10, 1900 — February 26, 1901.

Reference: Setting aside findings: Appeal: Partnership: Attorneys at law: Compensation: Unauthorized settlement of debt by one partner: Concealment: Collusion with debtor: Notice: Interest: Demand: Judgment: Mandate on appeal.

1. Findings of fact by a referee should not be disturbed by the trial court, or by the supreme court on appeal, unless they are against the clear preponderance of the evidence.
2. In an action by one member of a firm of attorneys against a railway company to recover for services rendered by the firm, the other

partner being made a defendant because he refused to join as plaintiff and claimed that he had settled for such services in an agreement for his future employment by the company upon a monthly salary, the evidence is *held* insufficient to warrant the trial court in setting aside findings of the referee that the defendant partner fraudulently concealed from the plaintiff the fact that he had released the company from liability for said services; that the general counsel of the railway company aided and abetted him in such concealment; and that the value of said services was $25 per day.

3. Settlement by one partner will not conclude the firm, if obviously unreasonable, or if the consideration, other than money, moves primarily to the personal benefit of the settling partner. In such cases the opposite party is so chargeable with notice of want of authority that he is held to act subject to the actual consent or approval of the absent partner.

4. It is unreasonable for one member of a firm of attorneys, without the consent of his copartner, to release a claim of the firm for $2,200, for an indefinite, momentarily terminable agreement to pay the settling partner a salary of $200 per month for future services — a sum not shown to be substantially in excess of the probable reasonable value of such services — especially where the partner so employed might terminate the partnership at will.

5. Where, according to the arrangement between attorney and client, no time was fixed for payment for services except as statements were rendered, interest would not begin to run on such a claim until a demand was made.

6. Where one partner settles a firm debt without authority and under such circumstances as not to conclude the other partner, the latter, in an action against his copartner and the debtor, should have judgment for the entire amount of the debtor's liability, limited as to collection and enforcement, however, to such sum as he is entitled to receive, as between himself and his copartner, from the assets of the partnership, inclusive of such judgment.

7. Where the entry of such a judgment has been directed by the supreme court on appeal, it is the duty of the trial court to enter judgment at once for the full amount of the debtor's liability. Execution of that judgment, however, is entirely within the control of the trial court, and any steps by way of accounting, which may be necessary to render its enforcement and execution equitable, are within its inherent power, and no specific directions to that end are necessary in the mandate.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Plaintiff and defendant *Murphy*, lawyers, were copartners under the firm name of Murphy & Remington from November 24, 1894, up to September 18, 1896. As such, up to January 1, 1896, they were employed in various matters by defendant *The Eastern Railway Company of Minnesota*, and, among other things, throughout said period were employed for the defense of two important suits for timber damage resulting from fire, the damages claimed being about $56,000 in each case, in which a large amount of work had been done and not paid for. Defendants claim that on or about January 13, 1896, the firm entered into an agreement with the *Eastern Railway Company* whereby *Murphy* was employed for an indefinite period, commencing January 1, 1896, as local attorney at Superior, upon a fixed salary of $200 a month, in consideration whereof any liability of the company for unpaid services in the fire cases was settled and satisfied. It is conceded that plaintiff consented that *Murphy* should make a new arrangement by which the compensation for services rendered for the company after January 1, 1896, should be a monthly salary, and that that agreement might be in form between the two defendants, it being agreed between him and *Murphy* that he was to share therein. Plaintiff claims that *Murphy* stated the salary so agreed upon at $150, and did not disclose to him the fact that there was included in such arrangement any settlement of past indebtedness or liability. He also claims that there was in fact no such agreement, but that the two defendants subsequently colluded to assert and establish that fact, or, if there was any such agreement between them, that it was secret and collusive and intentionally withheld from plaintiff's knowledge. No accounting or settlement of the affairs of the firm of Murphy & Remington has been had, and the plaintiff joins *Murphy* as defendant because he refuses to

join as plaintiff. The recovery sought is the reasonable value of the services in those fire cases.

Upon trial before a referee, he found the rendition of the services to the extent of 104 days, and that only the retainer and thirteen and one-half days thereof had been paid; which findings were confirmed by the court, and the confirmation not excepted to by respondents. He found the value of the services at $25 a day, and the balance due $2,262.50; also that defendant *Murphy* did agree, in consideration of a promise to pay him $200 per month for such services as he might render as attorney, that no further compensation should be made for past services in the fire cases, which agreement was made collusively by both defendants, in fraud of the existing partnership and the rights of plaintiff; that *Murphy* withheld from plaintiff all knowledge of such stipulation of settlement, and also deceived him with the information that the salary was to be only $150 per month, and that the railway company aided and abetted said *Murphy* in such fraudulent concealment; and, as conclusions of law, held that the agreement of settlement was not binding; that the plaintiff, on behalf of the firm of Murphy & Remington, was entitled to recover $2,262.50, the enforcement of the judgment to be limited, however, to the amount which should be actually due plaintiff as between himself and *Murphy*.

The court, upon hearing on this report, modified the same to the extent merely of holding that *Murphy* was expressly authorized to make an agreement for a salary, and that he also had general authority to make the agreement for settlement; that the amount of the salary was not correctly stated by *Murphy* to the plaintiff, but that plaintiff received $75 per month as one half of the amount of the salary as stated by *Murphy*. He repudiated the finding of collusion between *Murphy* and the railroad company, or existence of any facts to impeach its validity, but, impliedly at least, confirms the finding of the referee that plaintiff

never had any knowledge thereof. The court accordingly concluded, as matter of law, that no cause of action existed in favor of plaintiff against the *Eastern Railway Company*, and that the form of the action did not justify the court in proceeding to an adjustment of the partnership accounts between plaintiff and *Murphy*, and entered judgment dismissing the action on the merits, from which plaintiff appeals.

For the appellant there was a brief by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *F. H. Remington* and *J. G. Flanders*. To the point that *Murphy*, as a partner, had no authority to make the settlement alleged, they cited *Blewett v. Gaynor*, 77 Wis. 391; *Cotzhausen v. Judd*, 43 Wis. 213; *Seaman v. Ascherman*, 57 Wis. 547, 553; 1 Lindley, Partnership (Ewell's ed.), *237–*239; 17 Am. & Eng. Ency. of Law (1st ed.), 1038, and cases cited; *Lee v. Hamilton*, 12 Tex. 413; Story, Agency, § 98; *Niemann v. Niemann*, 43 Ch. Div. 198; *Russell v. Green*, 10 Conn. 269–279; *Bergland v. Frawley*, 72 Wis. 559; *Smith v. Sloan*, 37 Wis. 285; *Davis v. Dodson*, 29 L. R. A. 496; *Woodruff v. Scaife*, 83 Ala. 152; *Battle v. Street*, 85 Tenn. 282; *Walcott v. Canfield*, 3 Conn. 194; *Clements v. Norris*, 8 Ch. Div. 129; *Moynahan v. Prentiss*, 10 Colo. App. 295; *Marsh v. Gold*, 2 Pick. 285; *Worster v. Forbush*, 171 Mass. 423; *Schellenbeck v. Studebaker*, 13 Ind. App. 437; 1 Bates, Partnership, § 368.

Charles Quarles, of counsel for the respondent *Eastern Railway Company of Minnesota*.

The following opinion was filed January 8, 1901:

DODGE, J. After a most careful examination of the evidence, we are unable to find justification for the action of the court below in setting aside the three important findings of the referee: first, that defendant *Murphy* concealed from his partner, *Remington*, the fact that he had released defendant company from any liability for work done in the fire cases in consideration of the agreement to pay him a

salary; second, that defendant company's general counsel, Grover, well knew of the partnership relation, and aided and abetted defendant *Murphy* in fraudulently withholding from plaintiff knowledge or information of the terms of the agreement made between them; and, thirdly, that the reasonable value of the services of the firm for said defendant company was $25 per day. To such findings must be accorded, both by the circuit court and here, the same weight and effect, in conclusively settling fair controversies over mere questions of fact, that by the oft-declared practice of this court is given to the findings of a court before which the issues are primarily tried. The facts found must be taken to exist, unless they are contrary to the clear preponderance of the evidence, to such an extent, indeed, as to force "conviction that the evidence did not receive proper consideration by the trial court [referee] through mistake in overlooking material portions thereof or from prejudice or some other cause." *Zoesch v. Thielman*, 105 Wis. 117; *Johnson v. Goult*, 106 Wis. 247; *Wyss v. Grunert*, 108 Wis. 38.

It may be that a fair construction of the court's order impliedly confirms the finding of the referee that *Murphy* did conceal from his partner the condition of settlement contained in his salary agreement; for it is stated that *Murphy* did not correctly state to plaintiff the amount of salary to be received. Now, the only evidence on the subject of any information to the plaintiff, either as to the amount of salary or as to the condition of settlement, is that of *Murphy*, of a specific conversation in which he claims to have given both pieces of information, and the view, evidently taken by the court, that this testimony was not true, we think indicates concurrence with the referee in the conclusion that *Murphy* did not have the conversation and did conceal the fact of settlement. Whether, however, this construction of the court's finding be correct or not, the evidence that *Remington* was kept in ignorance both that the salary was $200,

and that there was any agreement to settle the compensation in the fire cases, is abundant to justify the finding.

As to the question of confederation between Grover, general counsel of defendant company, and *Murphy*, to accomplish this concealment, the evidence is all circumstantial, as is almost inevitable. It consists, first, in the character of the agreement itself, which is one obviously likely to be highly objectionable to the plaintiff. Thereby, if valid, his interest in a claim to the amount of about $1,100 was canceled and abandoned in consideration of a promise to pay, not to him but to *Murphy*, an amount shown to be by no means unreasonably large, even as compensation for expectant services,— a promise in the benefits of which he might not share more than a single month, as the partnership between him and *Murphy* might have been terminated at any time. It is an entirely legitimate inference from this circumstance alone that, if both *Murphy* and Grover were silent afterwards, such silence was preconcerted between them. Good faith and reasonable courtesy, nay reasonable caution, would have led Mr. Grover either to insist on the submission of the agreement to *Mr. Remington*, or to inquire of him as to its satisfactoriness. The making of this agreement was followed by many months of silence, and, when inquiry was specifically made at Mr. Grover's office, the same falsehood as to the amount of salary which *Murphy* had told was repeated by Mr. Grover's chief clerk in a letter for which he does not assume responsibility, but which he did not take occasion to correct or repudiate when it came to his knowledge. Like repetition of this same erroneous amount is sworn by a disinterested witness to have been made by Mr. Grover to him a few months later. The fact that Grover made use of the same fictitious figure in his statement of the salary as that which *Murphy* had made before presents, at least, a striking coincidence from which a tribunal vested with the trial of facts might legitimately

draw inference of concerted action between them. There is, too, some evidence of the falsification of Mr. Grover's correspondence files by the interpolation therein of a subsequently prepared letter, bearing upon its face at the time of its examination evidence of having been written long subsequent to its ostensible date. If this were believed, the inference of collusion would be almost irresistible. Other circumstances might be referred to, but these were sufficient to justify the referee, having present before him as witnesses both *Murphy* and Grover, in drawing the inference of collusion to withhold knowledge from plaintiff of the surrender of his rights. Whether, as an original proposition, we should have drawn the same inferences and reached the same conclusion is a question not before us for consideration, but merely whether the simple denial by the accused parties so overwhelmingly preponderates in probative force over the circumstances and conduct as to justify a reversal of the findings of the referee on a question of fact. That question must be answered in the negative, and the contrary answer by the circuit court was erroneous.

With reference to the finding upon the value of services, which the court sets aside without substituting any finding of his own in its place, it must be borne in mind that both the referee and court have found, without exception by defendant, that plaintiff performed 104 secular days of labor, by means of which services the rights of defendant *Eastern Railway Company* in said cases were in all respects fully protected and well taken care of, and that in that behalf plaintiff and the defendant *Murphy*, as attorneys of record in those cases, fully and thoroughly performed their duties in a lawyer-like manner, of which only the retainer and thirteen and one-half secular days' labor have been paid for. These facts, therefore, are verities in the case. Plaintiff himself testified that the services were, in his opinion, of the reasonable value of $4,665. Four witnesses, experi-

enced lawyers, were called on to testify to a hypothetical question, in response to which they fixed values ranging from $4,500 to $7,000. Upon cross-examination, eliminating certain criticised elements of this hypothetical question, and presenting the circumstances which defendant claims should reduce the amount of recovery, those witnesses place the services, one at $35 per day, and the other three at from $3,000 to $4,000. Against this is the evidence of *Mr. Murphy*, which is devoted principally to the denial of the rendition in fact of the services, and is rendered largely immaterial by the absence of exception to the findings above mentioned. He estimates the value of their services, in excess of those paid for specifically, at from $400 to $500. The bills rendered from time to time for services in these cases were at the rate of $15 to $20 per day. In the light of this evidence, it cannot be said that there is any overwhelming preponderance of the evidence to show that the value found by the referee was too great, nor can we feel justified in saying, notwithstanding the considerable amount of expert opinion evidence, that there is sufficiently overwhelming preponderance to justify us in disregarding that finding and fixing a higher amount, for which action plaintiff strenuously contends. The question of the value of professional services is one as to which opinion evidence is not conclusive, especially when the tribunals which try such question consist of lawyers, themselves presumably capable of exercising judgment and forming opinions as to value from the various facts and circumstances established, the exact details, bearing, and weight of which were best capable of appreciation by the referee. *Crosthwaite v. U. S.* 30 Ct. Cl. 300, 310; *Jordan v. Swift I. & S. Works*, 13 Ky. Law Rep. 970; *Hansen v. Martin*, 63 Cal. 282; *Cullom v. Mock*, 21 La. Ann. 687; *Halaska v. Cotzhausen*, 52 Wis. 624.

We are satisfied that the findings of the referee should not have been disturbed, but should be accepted as correctly

expressing the facts on which the rights of the parties must be decided.

Independently of the express finding of collusion between the defendants as a fact, there can be no doubt of the correctness of the conclusion of law, drawn by the referee and repudiated by the court, that the release of the firm's claim for services in the fire cases is invalid as against *Remington*, under the rules laid down by this court. Settlement by one partner will not conclude the firm, if obviously unreasonable, nor if the consideration therefor, other than money, moves primarily to the personal benefit of the settling partner. In either such case the opposite party is so chargeable with notice of want of authority that he is held to act subject to the actual consent or approval of the absent partners. *Sauntry v. Dunlap*, 12 Wis. 364; *Viles v. Bangs*, 36 Wis. 131; *Cotzhausen v. Judd*, 43 Wis. 213; *Blewett v. Gaynor*, 77 Wis. 378, 391. The settlement here relied on involves both defects. It is unreasonable to release a legitimate claim of $2,200 for an indefinite, momentarily terminable agreement to pay a salary of $200 per month for future services, which sum is not shown to be substantially in excess of a prospective estimate of the reasonable value of such services. True, respondents urge that the amount earned by services for the railway company the preceding year had amounted to only about $140 per month, but they seem to overlook the fact that in that figure was not included the services in the fire cases which, as now found, would increase the amount to something over $300 per month. Especially unreasonable does this settlement appear when it is remembered that any benefit to be derived by plaintiff from such salary was subject, not only to the company's option to terminate the employment at any time, but also to *Murphy's* option to terminate the partnership at will. The latter consideration is, however, even more cogent as establishing a surrender by *Murphy* of the partnership rights for a benefit moving exclusively to himself, to the knowl-

edge of the firm debtor,— a fact which, in the light of the authorities cited, must be held to render the settlement void as against plaintiff, unless he concurred therein.

We are convinced, therefore, that the conclusion reached by the referee that the respondent railway company is still liable for the amount ascertained was correct, and that refusal to enter judgment accordingly was error, except as to the interest date adopted by the referee. Under the custom and arrangement between the defendant company and Murphy & Remington, there was no time fixed for payment, except as statements were rendered. The claim here involved was not fully liquidated, though, under the weight of authority, it was capable of liquidation by reference to reasonably certain standards of value for professional services. *Yates v. Shepardson*, 39 Wis. 173; *Farr v. Semple*, 81 Wis. 230; *Laycock v. Parker*, 103 Wis. 161, 187. Interest, therefore, should not run until a demand was made "sufficiently specific to inform the debtor of the claim made, so that he can ascertain therefrom the amount he ought to pay by application of the standard above set forth." *Laycock v. Parker*, 103 Wis. 188. There is no evidence of any demand until this suit was commenced, itself constituting one. Interest, therefore, should be computed only from that date instead of January 1, 1896, the date adopted by the referee.

Upon the authority of *Blewett v. Gaynor*, 77 Wis. 378, judgment should be entered against the defendant railway company for $2,262.50, with interest from the commencement of this action, limited as to collection and enforcement, however, to such sum as plaintiff is entitled to receive, as between himself and *Murphy*, from the assets of their partnership, inclusive of such judgment.

By the Court.— Judgment reversed, and cause remanded with directions to enter judgment in accordance with this opinion.

BARDEEN, J., took no part.

The following opinion was filed February 26, 1901:

PER CURIAM. The appellant moves this court for an amendment of the mandate so as to direct immediate entry, docket, and execution of judgment for costs, and further direction that the judgment to be entered contain provision for an accounting between plaintiff and defendant *Murphy*, to ascertain the amount which the former is entitled to receive from the assets of their partnership.

It is not considered that any amendment of the mandate is necessary to accomplish the principal purpose of this motion. Under that mandate, it is the duty of the superior court to enter judgment at once for the full amount of the liability of the defendant *Eastern Railway Company of Minnesota* to the firm of Murphy & Remington, as declared in the opinion. The execution of that judgment is entirely under the control of the court rendering it, and any steps in the way of accounting, on reference or otherwise, which may be necessary to render its enforcement and execution equitable, are within the inherent power of the superior court, upon motion. *Stein v. Benedict*, 83 Wis. 603; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125; *Johnson v. Huber*, 106 Wis. 282, 283. For this reason, the appellant's motion is denied.

GAERTNER, Respondent, vs. BUES, Appellant.

109	165
116	*630
116	*631

January 8 — February 26, 1901.

(1) *Appeal: Bill of exceptions: Instructions to jury.* (2-6) *Landlord and tenant: Invalid writ of restitution: Duty of officer: Unnecessary injury: Removal of goods to warehouse: Constructive redelivery: Punitory damages: Malicious acts of officer: Ratification.*

1. The supreme court on appeal will not review alleged errors in the charge to the jury unless the entire charge is incorporated into a bill of exceptions and made a part of the record or referred to in

such manner that it may be fully identified. Detached portions preserved in exceptions will not be considered.

2. Where a writ of restitution, valid on its face, is delivered to a constable, it becomes his duty to execute it without inquiry as to whether it will result in inconvenience or loss to the parties, and if he executes it without knowledge of its invalidity it affords him complete protection.

3. In the execution of a writ of restitution an officer is bound to use ordinary care and not do unnecessary injury to the property of the evicted tenant, and if he fails in that respect, both he and his principal are liable therefor.

4. If the evicted tenant fails to take the goods as they are removed, the officer may put them in a storage warehouse, and, if he exercises reasonable care in the selection of the warehouse and in the removal of the goods thereto, his full duty has been performed.

5. After removal of the goods to the warehouse in such a case a delivery to the evicted tenant of the warehouse receipt therefor is equivalent to a delivery of the goods to him, and his acceptance thereof restores him to full dominion over them, so that any loss or depreciation in value occurring thereafter cannot be recovered as an element of damages in an action against the landlord for the wrongful removal.

6. Punitory damages for the wanton and malicious acts of the officer who executed an invalid writ of restitution, whereby injury was caused to the evicted tenant or his goods, are not recoverable against the landlord unless he is shown to have authorized or ratified such acts.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

The defendant owned a building in the city of Milwaukee which was occupied by plaintiff as his tenant, and used as a boarding house. He commenced proceedings for unlawful detainer, and secured a writ of restitution. This writ was put in the hands of an officer, and was executed by the removal of plaintiff's household goods from the house. At that time plaintiff was sick and unable to care for the goods, so the officer removed them to a storage warehouse, and took a receipt therefor, which was delivered to plaintiff. It is conceded that defendant's proceedings to regain possession

were void and afforded no justification for his acts. The plaintiff brought this action, claiming damages for unnecessary injury to her household goods during the removal, depreciation during storage, and for personal injuries to herself. The defendant answered largely by way of denial.

A special verdict was rendered to the effect that defendant's agent caused unnecessary injury to the goods during removal; that such damage was $141.68; that the defendant ratified the removal of the goods to the storage warehouse and their detention there; that their depreciation while there was $1,005.66; that the constable and his assistants were guilty of such carelessness and negligence in removing said goods that plaintiff suffered personal injury; that her damages therefor were six cents; that the constable and his assistants acted in a wanton and malicious manner in removing said goods, causing injury to plaintiff; that the damages by reason thereof were $1,000. A motion for a new trial was made and denied. The judgment was entered for plaintiff for said several sums and costs. The defendant brings this appeal.

For the appellant there were briefs by *Ernest Bruncken*, attorney, and *Max W. Nohl*, of counsel, and oral argument by *Mr. Bruncken.*

Adolph Huebschmann, attorney, and *Fred S. Hunt*, of counsel, for the respondent.

BARDEEN, J. The respondent directs our attention to the fact that the judge's charge is not contained in the bill of exceptions. This is important, as many of the assignments of error are based upon alleged mistakes of law contained therein. Turning to the bill we find the only reference to the charge to be in the following words: "The judge having thereupon given the charge to the jury, which charge is a part of the record herein, defendant excepted to a portion of said charge in manner and form as follows." Then fol-

low the several portions excepted to. In *Graves v. State*, 12 Wis. 591, the rule was announced that, if the record did not purport to contain all the charge, the court would presume that the trial court did its full duty and explained the law correctly to the jury in the omitted portions. *Brabbits v. C. & N. W. R. Co.* 38 Wis. 298. In *Killips v. Putnam Ins. Co.* 28 Wis. 472, it was said that, in the absence of any instructions to the jury, the same force and effect is to be given to the verdict as would be given to it had the court instructed them, and instructed them correctly, on the law applicable to all questions of fact involved in the issue. In *Grottkau v. State*, 70 Wis. 462, no part of the charge was in the record, and it was said that the court was bound to presume that the directions therein were most favorable to support the verdict. Note, also, Bryant, Code Pr. 640.

If it is desired that this court shall review the judge's charge, the necessity of putting it in the bill of exceptions and making it a part of the record, or referring to it in such a manner as that it may be fully identified, is too manifest to require discussion. Detached portions preserved in exceptions are wholly inadequate. It often requires an inspection of the entire charge to determine whether a detached section is or is not erroneous. The better practice in such cases is to include the entire charge in the bill of exceptions, and then put it in the case, with the excepted portions either in brackets or italicised, so that the court, at a glance, can see the criticised portions in connection with their surroundings.

The respondent also insists that we cannot review the evidence because the bill of exceptions is not certified to contain all the evidence given on the trial. The certificate is substantially, in form, in accordance with the requirements of sec. 2873, Stats. 1898, and must be held sufficient. We are therefore at liberty to consider such rulings of the trial court as are not dependent upon alleged errors in the charge.

It will be observed that the purpose of this action is to recover damages claimed to have been sustained to the plaintiff's household goods by reason of their unlawful removal from the premises she had leased from the defendant. The defendant instituted proceedings, under the statute, for unlawful detainer. Judgment was rendered in his favor, and a writ of restitution, valid on its face, was delivered to the constable. It was issued by a tribunal having jurisdiction of such matters. So far as this case shows, neither the defendant nor the officer had any knowledge that complete jurisdiction of the case had not been obtained by the magistrate who issued the writ. This writ was a complete protection to the officer, and it became his duty to execute it without inquiry as to whether it would result in inconvenience or loss to the parties. *State ex rel. Chappell v. Giles*, 10 Wis. 101. In the exercise of his duties, however, he was bound to use ordinary care, and not do unnecessary injury to the tenant's property. If he failed in that respect, he was liable, as was his principal, for such injury.

The query arises as to his duties in the premises regarding the disposition and storage of the goods after removal. It must be conceded that, under the commands of the writ, it was his duty to remove the tenant and her belongings from the building, so as to give the owner complete dominion over it and to restore him to possession. In the performance of those duties, if the tenant failed to take the goods as they were removed, it was his duty, at most, to use ordinary care for their protection; that is to say, he could not put them in the street so as to blockade or obstruct it. He could not place them upon another's property without permission, and thereby become a trespasser. He might do as was done in this case,— obtain permission to put them in a storage warehouse. If he exercised reasonable care in the selection of a place to store them, and in the removal thereto, his full duty was performed. When, after the removal, he

delivered to the tenant the warehouse receipt, this was equivalent to a delivery of the goods to her, and her acceptance of it restored her to full dominion over them. From that time on the goods were at her risk. She might have refused to receive the receipt, and have held the principal for their value, if the proceeding was unlawful. She did not do so. She accepted and retained the warehouse receipt, and finally reclaimed the goods thereunder. Admitting that the proceeding was unlawful, it is difficult to see how the defendant can be held liable for damage to the goods occurring in the warehouse, after all dominion over them by the officer and defendant had ceased, and the plaintiff had the legal custody thereof. That she was poor and sick was her misfortune. Such circumstances have no bearing upon the legal rights of the parties. Much stress is laid in respondent's brief upon the fact that plaintiff was sick when the officer came to serve the writ. It may have been unkind, indeed, to have enforced it at that time, but that fact is of no legal significance. The defendant supposed that he was proceeding according to forms of law. The officer had no discretion to exercise. He was bound by the positive commands of his writ, and was not at liberty to wait for plaintiff's recovery, or omit to serve it because, in his opinion or the opinion of some one else, its execution would be prejudicial to the comfort or convenience of the plaintiff. Murfree, Sheriffs, § 1025. In this action, so far as a recovery is sought for the injury to her goods, it must be limited to such as resulted thereto directly and proximately from the wrongful acts complained of. Remote damages, or such as accrued after possession had been restored to plaintiff, are not recoverable. The allowance of a large sum for damages for depreciation while the goods were stored in the warehouse, while plaintiff had dominion over them, was erroneous.

The jury found that the constable and his assistants acted in a wanton and malicious manner, "thereby causing injury

to the plaintiff or her goods," and assessed her damages at the sum of $1,000. This sum was included in the judgment as a part of her recovery. There is no finding that such acts were authorized or ratified by the defendant. Without this, there can be no recovery as and for punitory damages. Such damages are given only by way of punishing the malice or oppression, and are usually graduated by the intent of the party committing the wrong. When the action is against the principal for the act of an agent, the question of their assessment cannot properly be submitted to the jury, unless there is evidence connecting the principal with such intent on the part of the agent. *Milwaukee & M. R. Co. v. Finney*, 10 Wis. 388; *Craker v. C. & N. W. R. Co.* 36 Wis. 657; *Patry v. C., St. P., M. & O. R. Co.* 77 Wis. 218; *Mace v. Reed*, 89 Wis. 440; *Bryan v. Adler*, 97 Wis. 124. The special verdict is therefore insufficient to support a judgment for punitory damages.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the case is remanded for a new trial.

HILDEBRAND, Administratrix, Respondent, vs. THE AMERICAN FINE ART COMPANY, Appellant. | 109 171 / 110 7 6

January 8 — February 26, 1901.

(1, 2) *Appeal: Review: Intermediate order.* (3–9) *Master and servant: Entire contract: Discharge for cause: Recovery for part performance.*

1. If a judgment be entered upon the verdict of a jury and afterwards upon motion an order be entered setting it aside and granting a new trial unless the party in whose favor the same was entered submits to a specified reduction thereof, and such party does so submit and the judgment is perfected accordingly, such order is an intermediate order as regards such perfected judgment, and is reviewable on appeal from such judgment, under sec. 3070, Stats. 1898.

2. If a party accept a privilege granted to take judgment, upon the theory that all facts warranting a more favorable judgment are established against him, he cannot thereafter change his attitude as to the existence of such facts for the purpose of preventing a review of any question legitimately arising thereon on an appeal from such judgment.

3. The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon, or at all, for services rendered up to the time of such termination, does not apply to a case where such a contract has been terminated by the employer for cause.

4. The rule generally in this country is that, where a servant is prevented from performing his contract, either from sickness or death or by reason of being discharged from the master's service, whether rightfully or wrongfully, he is entitled to recover for the services actually rendered, subject to the right of a recoupment in case of a rightful discharge, as hereafter stated.

5. In an action against an employer, by an employee who has been discharged for cause, to recover for services rendered, the employer may recoup such damage as he is legally entitled to by reason of the facts which rendered such discharge justifiable.

6. Though the general rule is that where a contract is entire the consideration moving from each party to the other is entire and the rights of the parties reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other, it admits of exceptions, and one of them is that it does not apply to a party failing to complete his contract when prevented from so doing by the other party, regardless of the reason for such prevention.

7. The circumstance of terminating an entire contract for labor bears on the right of one seeking compensation for part performance thereof, as follows:

(a) If one party withdraws by consent of the other after part performance of such a contract, he can recover thereon at the contract rate for what he has done.

(b) If a party to such a contract be wrongfully prevented by the other from rendering full performance, he can recover upon the contract for the services rendered prior to such prevention, and his damages for not being allowed to complete the contract, not exceeding the full amount he could have earned by such performance, such amount, *prima facie*, being full wages for the balance of the contract period, which may be reduced by proof that wages were or might reasonably have been earned during such time.

(c) If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for services rendered up to the time of such prevention, subject, however, to such damages as the other party may recoup in the action for the former's misconduct.

8. In an action to recover for part performance of a contract, of the party who has rightfully terminated the same, *prima facie* the amount recoverable is the contract rate for services rendered up to the time of the discharge; and that will prevail in the absence of a claim for damages properly pleaded as a counterclaim and established on the trial.

9. A person circumstanced as last above indicated must sue upon the contract or for damages, not upon a *quantum meruit*, though his recovery must be upon that basis, it being presumed that he earned and is entitled to the contract rate for the time his services continued, till the contrary is shown by evidence to sustain a properly pleaded counterclaim.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Milwaukee county: FRANK M. FISH, Judge. *Affirmed.*

Action for damages for breach of contract. The complaint was to the effect that plaintiff was duly authorized to prosecute the action for the benefit of the estate of Alfred L. Hildebrand, deceased; that about January 2, 1897, said Hildebrand and defendant made an agreement, whereby the former bound himself to work solely for the latter for one year from January 1, 1897, and the defendant, in consideration, agreed to pay Hildebrand thereafter the sum of $5,000 as a yearly salary, together with his expenses in the performance of his duties, and to allow him in addition a compensation of ten per cent. on all orders taken for goods to be furnished by defendant in excess of $50,000 in value; that Hildebrand faithfully carried out his part of the contract till wrongfully discharged by defendant, and would have continued to do so to the end of the period of his employment if permitted by his employer; that June 9, 1897, he was discharged without his consent, and without reasonable cause, and to his damage in the sum of $3,587.54.

It was stated in the complaint, by way of particulars, that the total sum paid to Hildebrand by defendant was $2,513.46, of which $1,101 was for expenses, and $1,412.46 to apply on salary.

The answer was to the effect that $1,638.46 of the payments made to Hildebrand was exclusive of expenses and was applicable to salary, though as a matter of fact nothing was due on the salary account till the expiration of the period of employment, and except upon condition of full performance of the contract of employment on the part of Hildebrand unless he was sooner discharged without cause; that he was discharged at the time alleged in the complaint, but that it was for an adequate cause, by reason of which no sum whatever was at any time due him from the defendant; that the cause of the discharge was that Hildebrand refused to obey the reasonable directions of the defendant, that he was dissolute in his habits and negligent in the performance of his duties to an intolerable degree. The answer was further to the effect that Hildebrand might have obtained employment after his discharge and in that way prevented any damages accruing to him by reason thereof. The answer also contained a counterclaim for money alleged to have been wrongfully obtained from defendant by Hildebrand while in defendant's employ prior to January 1, 1897, on the false pretense that the same was due for expenses. The amount of the counterclaim was $1,900. Issue was duly taken on the counterclaim.

The evidence on the trial showed that the contract of hiring was made by an acceptance by defendant of a written proposition submitted to it by Hildebrand, which was as follows:

"Beginning January 1, 1897, I shall expect you to pay me a salary at the rate of $5,000 per annum, and a commission of 10 per cent. on all amounts realized by you, in cash or its equivalent, on orders or contracts secured by me exceeding

$50,000 per annum. In consideration of this I will devote myself with all energy to your selling department, collection department, contested claims and such other work as you may assign to me, serving your interests to the very best of my ability. Should you not consider my services an equivalent, nor wish to speculate for the coming year to this extent, I would ask you to kindly notify me at once, writing me clearly and to the point and without circumvention."

At the close of the evidence defendant's counsel moved the court for a verdict in its favor, which was denied. It was then conceded by defendant's counsel that if, as a matter of law, the corporation became liable to Hildebrand for wages at the rate of $5,000 per year up to the 1st day of June, 1897, plaintiff was entitled to recover the sum of $517.04. The court ruled in plaintiff's favor on that point, and further that she was entitled in any event to recover wages at the rate of $5,000 per year up to the time the deceased was discharged, June 9, 1897, and all that he could have earned thereafter during his term if permitted to serve it out, if the discharge was not for a reasonable cause. The issue on that subject was submitted to the jury and they found in plaintiff's favor, assessing the total damages at $3,321.27. Judgment was rendered accordingly. There was a motion to set aside the judgment on the exceptions taken on the trial and because it was contrary to the law and the evidence. The court decided on such motion that the judgment should be set aside and a new trial granted on the whole case, unless plaintiff consented to have such judgment stand for $517.04, that being the amount necessary, with payments theretofore made, to compensate for Hildebrand's services to June 1, 1897, at the rate of $5,000 per year. Plaintiff submitted to such condition and reduced the judgment accordingly. From that this appeal was taken.

For the appellant there was a brief by *Fiebing & Killilea*, and oral argument by *H. J. Killilea.*

For the respondent there was a brief by *Quarles, Spence & Quarles*, and oral argument by *W. C. Quarles.*

MARSHALL, J. The assignments of error are sufficient to raise the question of whether the trial court erred in ordering judgment for plaintiff for $517.04. The determination of the court upon which the judgment rests is spoken of here as an order for judgment, because that is the effect of such determination, though the order, in form, was that a new trial be granted unless the plaintiff consented to reduce the judgment to $517.04. It is contended on the part of appellant that in making such order the court decided as a matter of law that the discharge of Hildebrand was justifiable,—while it is contended by respondent's counsel that the issue as to whether the discharge was justifiable was submitted to the jury and was found in favor of plaintiff; that such finding has not been disturbed; that the judgment as finally perfected was in part based thereon; and that no motion was made for a new trial before judgment, so as to present for review here the question of whether the verdict is contrary to the evidence. Neither contention appears to be borne out by the record. The court decided that the judgment was wrong and could not stand. That necessarily involved a decision that the verdict was erroneous for some cause. The decision being general, it is impossible to say whether it was based upon the ground that the verdict was contrary to the evidence, or upon the ground that some error of law had been committed in neglecting to submit an issue of fact that, if found in appellant's favor, might have reduced the verdict to $517.04. The indications from the record, however, are that the decision of the court was based on the idea that the finding of the jury on the issue submitted was contrary to the clear preponderance of the evidence. The court ordered the judgment to be set aside and a new trial granted unless the plaintiff consented to a reduction thereof to such an amount as would cover the wages earned and unpaid up to the 1st day of June, 1897. There was no controversy as to what that amount was, and

no controversy as to the facts upon which the question turned of whether the contract was entire. Both were questions of law, to be determined by the court from undisputed evidence, and had been decided. The ruling as to the character of the contract had been duly excepted to, and such decision was adhered to in making the order. The order was submitted to by plaintiff, and the judgment was accordingly reduced. That as effectually took the verdict of the jury out of the case as a vacation of it.

The accepted option to take judgment, upon the theory that the controverted issues of fact were found against appellant, precludes respondent from insisting otherwise to prevent appellant from having the ruling of the court, ordering such judgment upon that theory, reviewed by this court. It must be considered that such issues have, in effect, been determined against respondent, and that such determination is a verity in the case. The judgment appealed from rests on the order of the court permitting it to stand for $517.04. The order is intermediate the judgment as finally perfected. It involves the merits and necessarily affects such judgment, and is therefore reviewable on this appeal, without any exception thereto. Sec. 3070, Stats. 1898.

The sole defense to plaintiff's claim pleaded in the answer, that was supported by evidence on the trial, and was then and is now insisted upon, is that the contract of employment was entire and was terminated for cause. It is claimed that the rule, that where an employee wrongfully terminates such a contract he cannot recover upon it for services rendered, applies to a case where such a contract has been terminated by the employer for cause. Counsel for respondent seems to concede that such is the law. In that view it is insisted upon one side that the evidence shows conclusively that the contract was entire, and therefore that plaintiff cannot recover; and upon the other that it was not entire, and therefore that the judgment is right.

Whether the trial court considered the turning point in the case to be the one in controversy between counsel and decided it in respondent's favor, and in that way reached the conclusion embodied in the judgment, does not definitely appear.

Both counsel have misconceived the principles governing the facts of this case. The rule that an action cannot be maintained by an employee upon an entire contract without first fully performing on his part, does not apply where such performance is prevented by the employer, though such prevention be for cause. In the leading case in this court on the scope of the rule contended for, *Diefenback v. Stark*, 56 Wis. 462, 468, it was recognized that the rule does not apply where performance is prevented by act of God or the conduct of the party charged with the liability. In Mechem, Agency, § 635, it is said that the rule that no recovery can be had on an entire contract, without full performance, does not extend to those cases where the contract between the employer and employee is terminated by consent of the employer.

In England it appears that if an employee is prevented from carrying out his contract to the end, because of the conduct of his employer in discharging him for cause, he cannot recover for services rendered up to the time of the discharge. Smith, Master & S. (ed. 1885), pp. 220–222; Wood, Master & S. § 129. But, generally speaking, such is not the law in this country. Wood, Master & S. § 130; 14 Am. & Eng. Ency. of Law (1st ed.), 793, and cases cited; 2 Sutherland, Dam. (2d ed.), 1546; *Taylor v. Paterson*, 9 La. Ann. 251; *Lawrence v. Gullifer*, 38 Me. 532. The rule in England and this country is thus stated by Wood on Master & Servant, at § 84: "If the contract is for a term, although the rate of compensation is at so much a day, week, or month, yet if the contract is silent as to the time of payment, it is entire and indivisible, and full performance must

precede a right of recovery," in the absence of circumstances showing that the contract was not understood by the parties as entire. "So inexorable has this rule been regarded in England that it has been held that where a servant hired for a term dies before full performance, no recovery could be had by his executors for the wages earned at the time of his death, and the same rule is held in the case of a servant dismissed for cause. *But such is not now the rule in this country, but in all cases* where the servant is prevented from performing his contract, either by sickness or death, *or by reason of being discharged from the service, whether rightfully or not*, he is entitled to recover for the services actually rendered."

Circumstances may exist that will enable an employer, who has discharged an employee for cause, to defeat, in whole or in part, any claim for wages up to the time of the discharge, but the mere fact that the contract is entire will not give him that power. He may recoup such damages as are allowable to him in such a case under the rules of law, because of the conduct of the employee rendering his discharge necessary. But they must be claimed in the pleading and established on the trial. Mechem, Agency, § 619; Sutherland, Dam., *supra; Newman v. Reagan*, 63 Ga. 755. The text in Sutherland is well supported by the notes and is as follows: "The general rule, when a servant is discharged for cause, is to allow him his wages to the time of discharge, subject to deductions for his torts and deficiencies." No such damages were claimed here. On the contrary, as we have seen, it was conceded on the trial that plaintiff was entitled to the judgment rendered, unless precluded therefrom by reason of the contract of employment being entire.

There is danger, as is evidenced by this case, of confusing the law applicable to a case where an employee under an entire contract voluntarily abandons it, and that applicable

where such an employee is prevented from carrying out his contract by the justifiable conduct of his employer in discharging him. In the former case he cannot maintain an action upon the contract at all; in the latter he can maintain such an action for wages up to the time of the discharge, subject, however, to the right of the employer to recoup damages.

What has been said does not militate at all against the general rule laid down in *Diefenback v. Stark*, 56 Wis. 462, to the effect that when a contract is entire, the consideration moving from each party to the other is entire, and their rights are reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other. However, like most general rules, it admits of exceptions, and there are several of them, one being that which is the key to plaintiff's right of recovery here, viz.: the condition precedent, of full performance by one party, is waived if the contract be terminated by the other party, regardless of whether it is by his mere consent or by his rightfully or wrongfully preventing such performance. The only bearing the cause for terminating an entire contract by one party has on the rights of the other seeking compensation for what he has done under it, may be stated as follows: If one party to a contract withdraws from it by consent of the other after part performance thereof, he can recover for what he has done at the contract rate. If a party to an entire contract, after part performance thereof by him, be prevented by the wrongful conduct of the other from rendering to such other complete performance, he can recover upon the contract for what he has done, at the contract rate, and his damages for not being allowed to fully perform, not exceeding the full amount he could have earned by such performance. If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for the part

performance, not exceeding the contract rate, being liable to respond in damages to the adverse party to the amount of the latter's legal damages caused by the acts that justified the termination of the contract.

The foregoing is in harmony with *Walsh v. Fisher*, 102 Wis. 172; *Winkler v. Racine W. & C. Co.* 99 Wis. 184; *Dickinson v. Norwegian P. Co.* 101 Wis. 157; and other cases decided by this court. In this class of cases it is said the basis of recovery is the contract, though the amount recoverable is by no means absolutely fixed thereby. It *prima facie* furnishes the standard from which to compute the value of the claimant's services, and while the recovery cannot exceed the amount computable by such standard it may be reduced by damages suffered. The rule is laid down in Wood, Master & S., at § 130, thus: "A dismissal for cause before the expiration of the term does not operate as a rescission of the contract, so as to enable the servant to sue upon *quantum meruit.* He must either sue upon the contract or for damages for its breach, and in either event the result of his recovery is the contract price, subject to such deductions as the master is legally entitled to." That is to say, while the person dismissed from service for cause cannot sue upon a *quantum meruit*, his recovery must be upon a *quantum meruit* on the contract basis, it being presumed that he earned and deserves the contract price for the time his services continued, till the contrary be shown by evidence establishing a right to deductions therefrom as recoverable damages. In short, as said by one of the authorities above quoted, the discharged servant is entitled in any event "to his wages to the time of his discharge, but subject to deductions for his torts and deficiencies."

It follows from the principles stated that the judgment appealed from is right, regardless of any question presented in the briefs of counsel for either side. Plaintiff's intestate, after part performance of his contract with appellant, was

for good cause prevented from completing his term. Such performance, at the contract rate, with interest, amounted to the sum for which judgment was rendered. No damages were claimed for the acts, of which the intestate was guilty, that necessitated his discharge. That being the situation at the time the judgment was ordered, there was nothing before the court entitling appellant to any diminution of the amount earned by the intestate at the contract rate.

By the Court.— The judgment of the circuit court is affirmed.

JOHNSTON, Respondent, vs. CHARLES ABRESCH COMPANY, Appellant.

109 182
114 418

January 9 — February 26, 1901.

(1) *Money had and received: Recovery of insurance money from bailee.* (2) *Appeal: Presumption as to when motion for new trial was made.*

1. A complaint alleging that the loss by fire on defendant's stock, including plaintiff's victoria which was in defendant's possession for repairs, had been adjusted by the insurer and paid to the defendant, and that the latter had refused to pay over the share to which plaintiff was entitled, stated a cause of action for money had and received; and when plaintiff's evidence showed that no claim for the value of the victoria was made to or adjusted by the insurer, a nonsuit should have been granted.
2. Where the record recites that a verdict was rendered, and that "thereupon the defendant moved for a new trial," it will be presumed on appeal, in the absence of a showing to the contrary, that the motion was made at the same term at which the action was tried.

APPEAL from a judgment of the superior court of Milwaukee county: OREN T. WILLIAMS, Judge. *Reversed.*

The complaint alleges: The corporate character and business of defendant. That prior to April 13, 1898, plaintiff

was the owner of a victoria of the value of $1,000, which prior to said date plaintiff had placed in defendant's possession for the purpose of repairing and storing the same. That prior to said date defendant had effected fire insurance and held policies covering its stock and vehicles either owned or held by it "in trust, or on commission, or in storage, or for repairs or sale, but not removed," which covered said victoria. The total amount of said insurance was $13,094. On said date fire destroyed defendant's stock, and damaged said victoria so as to render it wholly useless. The loss on said stock, including said victoria, to the amount of $13,094, was duly adjusted. The total loss upon defendant's stock was $17,220.25. After said fire, and before adjustment of loss under said policies, plaintiff caused notice to be given defendant and the several insurance companies that she claimed the benefit of said insurance upon said victoria, and that she was entitled to be paid for all damages thereto from said fire out of the insurance money to be paid under said policies. She also notified defendant of the damage to her said property, and demanded that defendant insert in the proofs of loss her claim for $1,000 for loss and damage to her property by reason of said fire. That defendant has collected the total amount of said insurance, being the amount of $13,094, and defendant has failed and refused to pay plaintiff her proportionate share of the insurance collected on account of the damage to said victoria. Judgment for $760.39 was demanded as her proportionate share.

The answer admits holding policies of insurance, but denies that said policies covered plaintiff's victoria or any other property, except the interest of defendant for work done in the way of repairs; admits the loss by fire, adjustment of loss, which did not cover said victoria, except the sum of $30, which was the amount of repairs done on the same by defendant, and that defendant had collected from the companies by reason of said loss the sum of $13,094.

Upon the trial, plaintiff introduced evidence as to the value of the victoria, and of notice to defendant and the adjuster of the companies that she claimed a right to the insurance moneys under the policies for the loss stated. She also proved by the adjuster that the claim for the value of the victoria was not included in the proofs of loss. At the close of plaintiff's case a motion for nonsuit was denied, and duly excepted to. Defendant introduced testimony as to its intention only to secure insurance on its interest in the property, which was afterwards stricken out. A motion to direct a verdict for defendant was denied. The only question submitted to the jury was as to the value of the victoria, which was found to be $537. A motion for a new trial was denied, and judgment was entered for plaintiff for $434.67, being for what is claimed to be defendant's proportionate share of the insurance money paid and interest. To review this judgment, defendant has taken this appeal.

For the appellant there was a brief by *Fiebing & Killilea*, and oral argument by *H. J. Killilea*.

For the respondent there was a brief by *Miller, Noyes & Miller*, and oral argument by *George H. Noyes*.

BARDEEN, J. The facts stated in the complaint show that this is an action for money had and received. In *Limited I. Asso. v. Glendale I. Asso.* 99 Wis. 54, this court said: "The rule is quite elementary that, to enable a person to maintain an action for money had and received, it is necessary for him to establish that the persons sought to be charged have received money belonging to him, or to which he is entitled. That is the fundamental fact upon which the right of action depends. *Nat. T. Co. v. Gleason*, 77 N. Y. 400. The purpose of such an action is not to recover damages, but to make the party disgorge, and the recovery must necessarily be limited by the party's enrichment from the alleged transaction." See, also, *Woodward v. Hill*, 6 Wis. 143; *Lawton*

v. Howe, 14 Wis. 246; *Fay v. Lovejoy*, 20 Wis. 407; *Wells v. Am. Exp. Co.* 49 Wis. 224; *Blewett v. McRae*, 88 Wis. 280; *Huganir v. Cotter*, 102 Wis. 323.

The cause of action stated proceeds upon the assumption that defendant has received money for insurance upon the plaintiff's victoria, which, in equity and good conscience, it ought to pay over to her. It is alleged that the loss on defendant's stock, including plaintiff's victoria, was adjusted by the insurance companies and has been paid to defendant, and that the latter has neglected and refused to pay over the share to which plaintiff is entitled. Upon this basis, when the plaintiff proved that no claim for the value of her property was made to or adjusted by the insurance companies, her cause of action entirely failed, and the motion for a nonsuit ought to have been granted. The only allegation of any shortcoming on the part of defendant is a failure to pay over the money which it is claimed it received for plaintiff's use. Having affirmatively shown that defendant had not received any such money, the defendant was absolutely entitled to a ruling that plaintiff's right to recover upon the allegations of her complaint did not exist.

This renders it unnecessary to consider or discuss other questions raised in the briefs of counsel, save the one relating to the motion for a new trial. The record shows that the jury returned a verdict on February 6, 1900, and then says, "Thereupon the defendant moved the court for a new trial, which was denied." It is urged that because it does not affirmatively appear upon what grounds the motion was based, or that it was made at the same term at which the action was tried, no question is presented to this court as to any error sought to be raised thereby. We need not repeat what was said in *Williams v. Williams*, 102 Wis. 246, regarding the practice in such cases. The recitation in the record of the rendition of verdict, and that "thereupon the defendant moved for a new trial," reasonably construed,

means that such motion followed the verdict in the usual succession of events, and was seasonably made. In absence of any showing, we cannot assume that it was at a subsequent term. On the contrary, we are bound to presume that it was at the same term at which the action was tried. Error, to be available, must affirmatively appear.

By the Court.— The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded for a new trial.

In re Luscombe's Will.

January 11—February 26, 1901.

109 186
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Wills: Joint trustees: Right to appeal: Refusal of one to join: Jurisdiction: Costs: Termination of trust: Happening of contingency: Proceedings by creditor to reach income of trust fund: Parties: Distribution of estate: Assignment by distributee.

1. Testamentary trustees who are given a portion of the testator's estate to hold and administer for the benefit of persons in existence and also for the ultimate benefit of yet unascertained persons, including unborn children, may appeal from an order or judgment for the distribution of said portion, even though all the persons in existence who are beneficially interested in the conduct of the trustees consent to such distribution.
2. In such a case one of the joint trustees who believes that the judgment deprives the trust estate of property belonging to it has power to appeal, notwithstanding the refusal of his co-trustee to join with him; and if all parties in interest, including such co-trustee, are before the appellate court it may consider the merits of the appeal.
3. The trustee so appealing acts in peril of being denied reimbursement of his expenses if his appeal is not taken in good faith and upon reasonable grounds.
4. A testator, after certain specific legacies, gave the residuum of his estate to his executors in trust to be invested and a part of the income paid to his son during life. He expressly declared that his intention in making such provision was to secure to said son the

necessaries of life, so that said income or estate could not be in any way controlled or disposed of by him or taken by his creditors. He directed that, in case any proceedings should be instituted for the purpose of reaching the income so provided for and of diverting it from the object intended by him, and a decree or judgment obtained for that purpose, then all payments from the income to the son should cease and, if there were no lawful issue of the son living, the trustees should distribute the property to the wife and a daughter of the testator. *Held*, that this direction, even if it were in conflict with the declaration of the testator's purpose, would nevertheless be controlling because it is mandatory and because it is the later provision. It does not, however, necessarily conflict with such general purpose, but merely implies a limit thereto.

5. By a stipulation under which, after a contest, the will was admitted to probate, the said widow and daughter conveyed to the son any portion of the body of the estate which might come to them in the event of the termination of the trust as to him. Such trust having been terminated by the happening of the specified contingency, *held*, that it was properly adjudged that said portion of the trust estate had passed to and become vested in the widow and daughter, and payment thereof to the son was properly directed in accordance with the assignment to him contained in the stipulation.

6. Before final settlement of the estate a judgment creditor of the son brought an action for the purpose of subjecting the son's interest in the income of said trust estate to the payment of his judgment, and obtained a decree in form to that effect. This was not done by said creditor with the purpose of avoiding the provisions of the will, but the son, knowing that it would have that effect, made no resistance to the action. *Held*, that thereby the contingency had happened upon which the trust as to the son was to terminate. The judgment was one obtained "for the purpose of reaching the income," within the meaning of the will, although the will itself put the income beyond the reach of such a judgment.

7. The fact that the trustees were not made parties to such judgment does not render it ineffectual to terminate the trust. Though not binding on the trustees, it was binding on the son personally and could compel him under penalty for contempt to pay over the instalments of income as they were received.

APPEAL from a judgment of the circuit court for Milwaukee county: EUGENE S. ELLIOTT, Circuit Judge. *Affirmed.*

The appeal is from a judgment of the circuit court af-

firming, with certain modifications, the order of the county court for final distribution under the will of Samuel D. Luscombe. That will, which disposed of an estate of $85,000, after certain specific bequests devised the residue of the property to the executors, *David C. Green* and *Thomas J. Pereles*, as trustees to collect rents and profits, convert into money, and reinvest according to directions given; to pay therefrom the expenses of administration and certain specific bequests, some of which are paid and some lapsed by reason of the nonexistence of the conditions on which they were payable; but, further "b," to set aside the sum of $5,500, and pay the interest thereof to a daughter of the testator, *Nellie M. Sanger*, during the term of her life; the residue to be invested, and "the net income derived from such investments shall be paid in equal shares and semi-annual payments, respectively, to my son, *Robert* [*Luscombe*], and my said daughter *Nellie* [*Sanger*], during the terms of their respective lives." The foregoing was embodied in what was designated subdivision "f" of paragraph 7 of the will. The will proceeded:

"Eighth. In the event of the death of my said son, *Robert Luscombe*, either before or after my decease, I give, devise, and bequeath to the lawful issue, if any, of the said *Robert Luscombe*, one half (½) of the residue of my estate mentioned in subdivision 'f' of paragraph seventh of this will, together with the income then accumulated thereon. In the event of the death of my said son, *Robert Luscombe*, either before or after my decease, without lawful issue, said residue, including the unpaid income on all of the same, my said trustee shall: (1) Set aside one fourth (¼) part of said residue to be added to the fund and held in trust and invested in first mortgage real-estate securities for the benefit of my said daughter *Nellie M. Sanger*, and the income thereof paid to her during the term of her natural life, in addition to the income provided under subdivision 'f' of paragraph seventh of this will. (2) To pay one fourth (¼) of said residue to my said wife if living at such time. (3) The remainder, including the part to my wife in case of her death, to

be paid to my said daughter *Mary J. Wright;* she to have and to hold the same, to her, her heirs and assigns, forever.

"Ninth. In the event of the death of my said daughter *Nellie M. Sanger* either before or after my decease, I give, devise, and bequeath the said fifty-five hundred (5,500) dollars mentioned in subdivision 'b' of paragraph seventh of this my will, the one-half (½) of the residue of my estate mentioned in subdivision 'f' of said paragraph seventh, together with the income accumulated thereon, and the one-fourth (¼) part set aside of the share of my said son, *Robert Luscombe*, in the event of his death, as provided for in the preceding paragraph eight, all to be paid to the lawful issue of my said daughter *Nellie M. Sanger*, if any. In the event of the death of my said daughter *Nellie M. Sanger*, either before or after my decease, without lawful issue, said residue, including the unpaid income on all of the same, my said trustee shall: (1) Set aside one fourth (¼) part of said residue, to be added to the fund, and held in trust, and invested in first mortgage real-estate securities for the benefit of my said son, *Robert Luscombe*, and the income thereof paid to him during the term of his natural life in addition to the income provided under subdivision 'f' of paragraph seventh of this will. (2) To pay one fourth (¼) of said residue to my said wife, if living at such time. (3) The remainder, including the part to my wife in case of her death, to be paid to my said daughter *Mary J. Wright;* she to have and to hold the same, to her, her heirs and assigns, forever.

"Tenth. I hereby declare that, in making provision for the payment of the income of the portion of my estate hereby set aside for my son, *Robert Luscombe*, and my daughter *Nellie M. Sanger*, it is my design to secure to them, and to each of them, the necessaries of life, so that such income or estate cannot be assigned, charged, pledged, hypothecated, or in any way or manner controlled or disposed of by them, or either of them, or taken by their creditors; and for the purpose of making myself fully understood on this point, and to carry out such design, it is my will that my executors and trustees may, in their discretion, make payments to or for them, or either of them, from said net income, as provided for, or to wholly withhold the same, and in case any proceedings are instituted for the purpose of reaching the income so provided for, and of diverting it from the ob-

ject intended by me, and a decree or judgment obtained for that purpose, that then from that period all payments from the said income to them, or either of them, shall cease, and I direct my executors and testamentary trustees from thenceforth to expend the said income provided for in this item of my will, so far as may be necessary or requisite, to the education and maintenance of the lawful issue of them, or either of them, until such issue arrive at the age of twenty-one years, in which event the said property shall be by my said executors and trustees assigned and conveyed to the said issue in the proportion and as provided for for them in paragraphs eight and nine of this will; and in case there is no lawful issue of them, or either of them, living, then to distribute to my daughter *Mary J. Wright* and my said wife and their issue as hereinbefore provided."

The will was admitted to probate by stipulation of all parties except the executors, after an extended contest, a part of which stipulation consisted in a conveyance to *Robert Luscombe* by the widow, *Seville Luscombe* (now *Turner*), and by *Mary J. Wright*, of any portion of the body of the trust residuum which might come to them in the event of the termination of said trust as to *Robert*, either by adjudication of its invalidity, or by reason of any judgment of any kind against said *Robert*. Thereupon, before final settlement of the estate, on March 18, 1899, one Goodwin recovered a judgment against *Robert Luscombe* in justice's court, transcripted the same to the circuit court, issued execution thereon, which was returned unsatisfied, and thereupon commenced an action in the superior court of Milwaukee county upon said judgment, for the purpose, as the court found, of "subjecting the interest of *Robert Luscombe* in the income bequeathed for him in trust by said will to the payment of said judgment," and recovered a decree or judgment in form subjecting the said interest of *Robert Luscombe* to the payment of said Goodwin judgment and costs. The court further found that said judgments were entered upon a *bona fide* debt, and not with any purpose on the part of said

Goodwin of avoiding the provisions of the will of said testator for the benefit of said *Robert*, but that said *Robert* knew that said judgment would have that effect, "and, while not appearing in said action, permitted the said judgments to go against him, and acquiesced in them, by making no resistance to said actions and failing to pay said demand." Neither of the executors were parties to Goodwin's actions.

At the time of his father's death, *Robert* was, and at all times since has been, without issue, and is now unmarried, being divorced from his former wife. *Nellie Sanger* is a widow without children, and *Mary J. Wright* has two children. Said three persons are the only children, and with the widow, *Seville*, are the only heirs at law, of the testator. It was stipulated that at the time of making the will, and at all times since, *Robert* was a practicing attorney, in no wise dependent upon his father or any other person, and received no pecuniary assistance from his father, but maintained himself by his own exertions, and since 1890 had been a total abstainer from all intoxicating liquors or any form of intoxicants, which facts were well known to the testator at and prior to the time of making his will; that at that time *Robert Luscombe* was a married man, but living apart from his wife, divorce proceedings being contemplated. His wife demanded about $10,000 permanent alimony, which demand was known to the testator, and testator was insistent that said wife should not have the right to enforce any claim to any of testator's property which might come to *Robert* by inheritance from him, and at and prior to the time of making the will in question asserted that this demand of *Robert's* wife was testator's controlling motive for making the trust provisions in said will relative to *Robert*, which trust provisions, however, were made applicable to all judgments, as therein described, so as to comply with the law, and not specify any particular demand of any particular person. Subsequent to testator's death, *Robert* obtained

a divorce from his wife, who has since remarried, so that she has no further claim for alimony.

The circuit court held that by the rendition of the judgments in favor of Goodwin arose the condition upon which the trust for the benefit of *Robert* became terminated, under the tenth paragraph of the will, and that, he having no issue, a certain portion of the body of said residuum passed to and became vested in *Mary J. Wright* and the widow, *Seville Luscombe* (*Turner*); that their assignments thereof to *Robert* were valid as between them, and transferred to him that to which they thus became entitled,—and accordingly directed payment to *Robert Luscombe* of one half of the residue devised in trust, less the specific $5,500 to *Nellie Sanger*, and the taking of his receipts therefor, as a satisfaction of so much of the share of the estate assigned and distributed to *Mary J. Wright* and *Seville De G. Turner*.[1]

From an order of distribution substantially to this effect in the county court, both of the trustees appealed to the circuit court. Upon the rendition of the decree in the circuit court the trustee *Pereles* decided and declared that, in his opinion, the welfare of the estate did not require further appeal or litigation, and declined to join in an appeal, whereupon the other trustee, *David C. Green*, believing the decree to do violence to the will of the testator, served notice of appeal in his own name upon all other parties interested in the estate, including his co-executor and trustee, *Pereles*.

For the appellant there were briefs by *Ryan, Ogden & Bottum*, and oral argument by *L. M. Ogden*.

For the respondent *Pereles* there was a brief by *Charles F. Hunter* and *Guy D. Goff;* for the respondent *Luscombe*

[1] In the stipulation by which the will was admitted to probate it was provided, in substance, that the portion of the trust residuum of which the income was to go to *Nellie M. Sanger* should be continued in trust under the terms provided in the will, and that such trust should be confirmed by the final decree.—REP.

there was a brief by *Timlin, Glicksman & Conway;* and the cause was argued orally by *Mr. Hunter* and *Mr. W. H. Timlin.*

DODGE, J. 1. Respondents move to dismiss the appeal on two grounds: first, that the executors, as such, have no interests to be affected by the final order of distribution, and are not aggrieved thereby; second, that one of the co-trustees or co-executors cannot appeal alone, hence no jurisdiction is conferred by his attempt to do so.

The first ground of the motion seems to be in oversight of the fact that the executors are also trustees, and that the appeal is in both capacities. As trustees they are beneficiaries under the will, to receive nearly one half of the testator's estate, to hold and administer the same for the benefit first of *Robert Luscombe* and *Nellie M. Sanger*, but also for the ultimate benefit of yet unascertained persons, including unborn children of either *Robert* or *Mrs. Sanger*. If the judgment appealed from is wrong, and the corpus of the half of the trust estate is not yet properly distributable to *Mrs. Turner* and *Mrs. Wright*, then it denies these trustees property which it is their duty to acquire and keep,—for the benefit of others, it is true; but in demanding and acquiring it they are the representatives of those others, and both entitled and bound to vindicate their rights. *Tyson v. Tyson*, 94 Wis. 225; *Jamison v. Adler-Goldman Co.* 59 Ark. 548. It matters not that all persons now in existence who are beneficially interested in the conduct of the trustees have consented that they yield to the judgment of the circuit court. Those officers still owe a duty to possible unborn children, whose rights cannot be cut off by consent. *Ruggles v. Tyson*, 104 Wis. 500. That duty is one of diligence to protect such helpless ones, and for breach of such duty, negligence, or laches, the trustees may in the distant future be called to account. Clearly, they and those whom they represent are

deprived of property by the decree appealed from, and are aggrieved if it be wrong.

Whether one of the two co-executors or co-trustees can appeal without the other is a question seemingly undecided,—at least, no direct authority is cited by either party, nor has extended research on our part disclosed any. Respondents' counsel presents, as analogous, the rule with reference to writs of error to review joint judgments. If analogy exists between appeal and writ of error, it is fatal to this ground of motion; for the rule requiring joinder of all those against whom the alleged erroneous judgment stands is one of practice merely, and does not go to the jurisdiction nor to the power of one to institute the proceeding, so far at least but that the court has control of the subject by severance or by amendment. *Harrington v. Roberts*, 7 Ga. 510; *Hardee v. Wilson*, 146 U. S. 179. And the objection is one which, unless promptly made by motion to quash or dismiss the writ, will ordinarily not be considered. *Huebschmann v. Cotzhausen*, 107 Wis. 64. Upon the rule of this case a motion to dismiss even a writ of error would probably be overruled under the circumstances of the motion under consideration, which was not presented until the case was reached for argument.

We do not, however, discover much analogy between the question of joinder in writ of error of all joint judgment defendants, and that of the power of one of two joint trustees to arouse our jurisdiction by a statutory appeal. The former is a question of practice in a new suit, originally instituted in this court by a common-law writ. The latter must be answered from consideration of the powers of joint executors and trustees generally, and from the statutes prescribing our jurisdiction, and the method of invoking it by appeal,—a proceeding in the original suit. *Northwestern M. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 125, 131. Addressing ourselves to the latter consideration, it seems to be pretty

well settled that statutory appeals are not subject to the rule of joinder which controls writs of error, and if the only objection here were failure to join as appellants all of the joint judgment defendants, independently of their co-trusteeship, we should have little hesitation in overruling it. *Mattison v. Jones*, 9 How. Pr. 152; *People ex rel. Keal v. Wayne Circuit Judge*, 36 Mich. 331; *Northwestern M. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 125, 133; *Hunter v. Bosworth*, 43 Wis. 583, 590; *Hardee v. Wilson*, 146 U. S. 179.

Turning then to an examination of the power of one of several joint trustees or executors, the underlying and general principle is that the trust is imposed on all jointly; that all together constitute but one collective person for the purpose of executing it; and, as a corollary, that the act of any of them, less than all, is not the completed act of that collective person and is ineffectual. 1 Perry, Trusts, § 411. The application of this principle to its full extent is not universal. 1 Perry, Trusts, § 411 *et seq.*; 2 Woerner, Administration, § 346 *et seq.*; *Weir v. Mosher*, 19 Wis. 311, 316. In the main, however, any substantial affirmative act—such, for illustration, as the conveyance of property—requires the joint action of all in order to have any validity. The application of this rule is comparatively easy to affirmative acts, omission of which would work no change in the property or estate, but becomes difficult when considering certain acts, omission of which has quite as direct effect as would the act itself. Among these latter fall the bringing of suits to recover or conserve property. Omission to sue may defeat a just claim, either by suffering the bar of limitation statutes or by insolvency of a debtor. It may effect the practical surrender or transfer of property. Thus it is apparent that the literal application of the rule to such cases may work the exact converse of its intention; for thereby one trustee, by refusing to act, might in practical effect accomplish release of a debt or conveyance of property without the con-

sent of his co-trustee. It is not surprising, therefore, that courts, while recognizing the rule of practice that joint trustees must join as plaintiffs, have also recognized the necessity that one trustee may invoke the aid of courts for protection of the trust estate, although his co-trustee refuse to join with him. Trustees are under the control of courts of equity, and it would be strange indeed if such courts could not protect against *devastavit* by the laches of one of several joint trustees. The ability of one to move alone under such circumstances is essential, not only to protect the estate, but also to protect himself from liability which might otherwise fall on him if valuable rights were lost through inaction when action is a duty. *Crane v. Hearn*, 26 N. J. Eq. 381. All of the following authorities decide or recognize the possibility of one trustee arousing the jurisdiction of courts in some form when he differs from a co-trustee as to the proper course: Perry, Trusts, §§ 411, 417; *Bockes v. Hathorn*, 78 N. Y. 222; *Thatcher v. Candee*, 4 Abb. Dec. 387, 391; *Portis v. Creagh*, 4 Port. (Ala.), 332, 343; *Reno's Ex'rs v. Davis*, 4 Hen. & M. 283, 288; *Todd v. Daniel*, 16 Pet. 521; *Weetjen v. Vibbard*, 5 Hun, 265, 267.

Among these citations are cases insisting upon the necessity of joinder of all trustees as a rule of practice, but recognizing that such rule does not deny the power of one to arouse the jurisdiction of the court, either by action in the name of all without their consent, or by suing alone, in which case the defect of parties may be cured by amendment. Our statute (sec. 2604, Stats. 1898) provides a method of avoiding that rule of practice, and a substitute for the ancient procedure by summons and severance, in the simple expedient in all actions of making defendants of those in joint interest who refuse to join as plaintiffs.

It seems certain, therefore, both on reason and authority, that one joint trustee is not without power to invoke the aid of courts for protection or recovery of the estate, when,

in his judgment, neglect to do so would be a breach of duty. Of course, in such case he must, as matter of practice, excuse the nonjoinder of his co-trustee, and bring him before the court as a defendant. Equally of course, he acts in peril of being denied reimbursement of his expenses if he litigates not in good faith, or without grounds to reasonably justify his judgment; but neither of these considerations goes to his power, nor to the power or jurisdiction of the court.

With this view as to the power of one joint trustee to originate litigation, we cannot doubt his power to invoke the appellate jurisdiction of this court under like limitations. An appeal is certainly no more extreme an act than the original commencement of action, even if we look upon it as the equivalent of writ of error, as some courts seem to. In this court, it has been said that appeal is but one step in a suit towards the final adjudication which the law has provided for. *Northwestern M. L. Ins. Co. v. Park Hotel Co.* 37 Wis. 131. If this view be adopted, the power of the single trustee would seem all the more obvious.

We conclude, therefore, that if the appellant, in good faith and on reasonable grounds, believed that the decree of the circuit court deprived the trust estate of property belonging to it, he had the power to appeal, notwithstanding the contrary opinion of his co-trustee, and that all parties in interest, including such co-trustee, being before this court, we have jurisdiction to consider the merits of the appeal, and that the motion to dismiss must be denied.

2. As appellant's counsel forcibly suggests, the decree before us presents at first glance the appearance of awarding *Robert Luscombe* the entire corpus of an estate which the testator clearly intended not to give him, but to tie up in the hands of trustees so that *Robert* should receive only the income. That appearance is, however, deceptive, and disappears upon any more than the most superficial examination. Absolutely nothing is awarded *Robert* under the will

or by way of gift from his father. The corpus of the trust estate is by the final order assigned and distributed to the widow, *Seville*, and to *Mary J. Wright*, to whom, as is entirely obvious, the testator intended to give it upon a certain contingency. The fact that they have assigned it to *Robert*, as a method of making a gift from themselves to him, can no more be said to thwart the will than if the widow had chosen to give him, by assignment, a part of her $35,000 legacy,—no more, indeed, than if both the widow and *Mrs. Wright* had received payment direct to themselves, and presented *Robert* with their checks for the amount. We must therefore dismiss the consideration that he by their bounty receives the actual payment from the executors, and consider the situation as if the decree not only assigned this disputed share to *Mrs. Turner* and *Mrs. Wright*, but ordered it paid to them as well, and as if they were the respondents contending for it here.

Passing then to a consideration of their rights under the will, we are confronted with the direct and positive command: "In case any proceedings are instituted for the purpose of reaching the income so provided for, and of diverting it from the object intended by me, and a decree or judgment obtained for that purpose, that then from that period all payments from the said income to them [*Robert* and *Nellie*], or either of them, shall cease; and I direct my executors and testamentary trustees, . . . in case there is no lawful issue of them [*Robert* or *Nellie*], or either of them, living, then to distribute to my daughter *Mary J. Wright* and my said wife and their issue as hereinbefore provided." This behest is mandatory, and quite as unambiguous as is the declaration of a purpose and design to provide for either *Robert* or *Nellie* the necessaries of life without subjecting either the estate or income to their control. It cannot be ignored. If it is in conflict with the declaration of design, it must dominate both because it is

mandatory and because it is the later provision. Cassoday, Wills, § 683. But it does not necessarily conflict with such general design, but merely implies a limit thereto. Such direction may indicate either that the testator considered such design hopeless or impossible of accomplishment in favor of a *cestui que trust* subject to such a judgment. Hopeless, because after money reached his hands it could not have full efficiency in providing necessaries of life to one embarrassed by attacks or harassed by solicitations of creditors, to whom portions of the testator's bounty would probably be diverted. Impossible, because, as testator may have believed or been advised, such a judgment creditor could reach and absorb the trust property or income unless such cesser and bequest over were provided for in the will. Whether or not such belief, if it existed, was well founded, we need not decide. It was by no means unsupported by respectable authority. *Bramhall v. Ferris*, 14 N. Y. 41; *Bull v. Kentucky Nat. Bank*, 90 Ky. 452; Perry, Trusts, § 388; and *Bridge v. Ward*, 35 Wis. 687. These might well justify the extreme precaution, although, as appellant's counsel forcibly argues, there is a considerable weight of authority to the contrary, as cited to us by appellant. *Nichols v. Eaton*, 91 U. S. 716; *Garland v. Garland*, 87 Va. 758; *Nickell v. Handly*, 10 Grat. 336; *Roberts v. Stevens*, 84 Me. 325; *Broadway Nat. Bank v. Adams*, 133 Mass. 170; *Hall v. Williams*, 120 Mass. 344,— the rule of which had not, however, been adopted in Wisconsin.

Whatever may have been the testator's motive, however, it was clearly his purpose that *Robert Luscombe* should enjoy the income of one half of the trust estate only until the happening of the contingency defined above, and that upon that contingency, he being without issue, the widow and *Mary J. Wright* should receive the corpus of the estate. It remains, then, to ascertain whether the record discloses that the specified contingency has occurred.

It appears — indeed, is found by the court without exception — that, upon recovery of a judgment at law and return of unsatisfied execution, action was commenced by Goodwin "for the purpose of subjecting the interest of *Robert* in the income bequeathed for him in trust by said will to the payment of said judgment, and that in the action last mentioned a decree or judgment was entered in form subjecting the said interest of *Robert Luscombe* to the payment of said Goodwin judgment." This would seem at first glance so direct an affirmative answer to the question as not to leave room for discussion, but appellant with much force insists to the contrary. He urges, first, that the proceeding and judgment taken and recovered by Goodwin, as matter of law, cannot have been for the purpose of reaching and diverting the income of the trust estate, within the meaning of the will, because it could not have that effect, since the will itself puts both estate and income beyond the reach of such proceeding and judgment. This reasoning is faulty, in that it deprives this clause of the will of all significance. It attributes to the testator the absurdity of providing a limitation over upon a contingency which he by the same will makes impossible. Certainly when the testator described the class of judgments upon recovery of which important rights were to vest, he intended to describe such as might exist, and might exist, too, without having the effect to divert any of the estate or income to the judgment creditor,— a result guarded against with the utmost precaution. He did not make the limitation over depend on recovery of a judgment which might or would reach and divert the income, but of one having such purpose. The judgment in favor of Goodwin goes as far in that direction as any judgment can. It, in form, subjects that income which the will gives *Robert* to the payment of the Goodwin judgment. It evinces the purpose and exhausts the ability of both the plaintiff therein and the court rendering it to reach that

income. If it fails, that result comes from the withdrawal of the income and the estate from its reach, and from *Robert's* reach as well, not from any want of purpose on Goodwin's part. We can entertain no doubt that it is of the class of judgments contemplated by the testator and described by him.

A further contention that this particular judgment, as matter of law, cannot be recognized as having a purpose to reach and divert the income, rests upon the premise that it cannot effectuate that result in the absence of the trustees as parties to it. That premise, however, is unsound. It may be conceded that no decree could be effectual to control the conduct of the trustees, nor the estate or income while in their hands, unless they were made parties. Such are the cases cited by appellant. *O'Hara v. MacConnell*, 93 U. S. 150; *McArthur v. Scott*, 113 U. S. 340. But such judgment or decree is binding personally on *Robert* and can compel him, under penalty for contempt, to hand over the semi-annual instalments of income the moment he receives them; thus, in practical effect, reaching that income and diverting it from *Robert's* support to the payment of Goodwin's judgment. The nonjoinder of the trustees is, however, one of several very significant evidentiary facts bearing on the purpose which Goodwin actually had in the proceedings prosecuted by him. That omission, when joined with the consideration that *Robert*, apparently without necessity, suffered judgment and supplementary creditor's suit on so trifling a claim (less than $200), and that those acts did not occur till after his arrangement with the widow and *Mrs. Wright* assuring him benefits upon the termination of the trust, might well arouse suspicion, if not justify belief, that the whole proceeding was collusive between him and Goodwin, and not in good faith for the purpose of reaching and diverting the trust income to Goodwin's judgment. That question, however, is not open on this appeal, since the purpose of the proceeding is established by a finding of the

circuit court to which there is no exception, and which therefore must conclude us as to the question of fact.

The views thus expressed sufficiently indicate the conclusion we must reach, namely, that the contingency was presented upon which the limitation over to *Mrs. Turner* and *Mrs. Wright* was to take effect. That conclusion supports, in general, the decision and judgment of the court below. Whether all the details of that judgment are strictly correct, we need not consider, for it is assailed only in its general scope, and, as we concur with it in that respect, we must affirm it.

We see no reason to doubt the good faith of the appellant executor and trustee in seeking the opinion of this court before surrendering so large a portion of the estate intrusted to him; hence the statutory costs of both parties in this court are ordered paid out of the estate.

By the Court.—Judgment affirmed.

THE STATE EX REL. WHEELER, Respondent, vs. NOBLES, Appellant.

January 11—February 26, 1901.

School district treasurer: Resignation: Vacating office: Cannot be clerk: Statutes construed.

1. Although secs. 961, 962, Stats. 1898, if unaffected by other provisions, would seem to permit a school district treasurer to resign at will and thus create a vacancy in the office, yet the specific provision of sec. 443 that "he shall hold office until his successor be elected or appointed and qualified as herein provided" must govern; and he cannot vacate his office, therefore, either by abandonment, acceptance of an incompatible office, or resignation.
2. Under sec. 443, Stats. 1898, providing that the clerk of a school district shall not hold the office of treasurer, a treasurer cannot, by attempting to resign and by accepting the office of clerk, become eligible to the latter office until his successor as treasurer has been chosen and has qualified.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Quo warranto to try title to the office of school district clerk of district No. 11 of the town of Wauwatosa. The case was tried by the court without a jury. Findings of fact were made which are not challenged. Briefly stated, they are as follows:

Relator and defendant are qualified electors of said school district. Relator was treasurer, his term of office expiring on the first Monday of July, 1900. A meeting of the electors was held July 3, 1899. Part of the business was the election of a clerk. A majority of the votes were cast for relator. He thereupon presented his resignation to the electors, and by a unanimous vote it was accepted. He then declared his acceptance of the office of clerk. Thereupon the electors elected defendant treasurer. Relator then received the records and books from the former clerk, and afterwards took the school census, and executed the office of clerk until ousted by defendant. The defendant refused to qualify as treasurer, and no person has been elected or appointed to that office. Relator has continued to hold the moneys of the district, but has refused to act as treasurer. On July 17th the town clerk, believing there was a vacancy in the office of district clerk, duly appointed the defendant to that position. Acting under such appointment the defendant, about July 28, 1899, assumed the office of clerk, and has since excluded the relator therefrom.

As conclusions of law the court found that relator, having publicly resigned his office of treasurer and accepted that of clerk, his former office became vacant, and he thereby became and was eligible to the office of clerk and entitled to the same; that the defendant unlawfully intruded into said office, and should be ousted therefrom; that relator was entitled to his costs. Judgment of ouster was duly entered.

The defendant insists that the relation fails to state facts

sufficient to entitle the relator to relief, and challenges the correctness of the conclusions of law on the ground that relator could not resign to a meeting of the electors, and could not abandon his office to become eligible to the office of clerk until his successor had been elected or appointed and had qualified. The defendant seeks to review the judgment of ouster by this appeal.

For the appellant there was a brief by *Wheeler & Perry*, and oral argument by *C. B. Perry*.

For the respondent there was a brief by *Roemer & Aarons*, and oral argument by *J. H. Roemer*.

BARDEEN, J. Relator's attempt to resign his office by tendering his resignation to the electors of the district at the annual meeting was ineffectual. His term of office continued until a year thereafter. To vacate his office by resignation, he must follow the plan laid out by the statute. Sec. 961, Stats. 1898, provides that the resignation of a school district officer shall be made to the district board. Such officers cannot *resign* in any other way.

But it is said that he has vacated and abandoned his office; that his attempt to resign and his public acceptance of the office of clerk completely terminated his tenure of office as treasurer, so that he became eligible to the office of clerk, notwithstanding the provision in sec. 443 that "neither the director, clerk, nor teacher shall hold the office of treasurer of his own district." There can be no doubt about the general proposition that he who, while occupying one office, accepts another incompatible with the first, *ipso facto* absolutely vacates the first office, and his title is thereby terminated without any other act or proceeding. This was the rule of the common law and has been recognized and accepted in many jurisdictions. See Mechem, Pub. Off. §§ 420, 425, 429, and cases cited. This rule, however, is subject to an important exception. Where the law expressly provides

that the officer shall continue to hold his office until his successor is chosen and qualified, he will not cease to be an officer by resigning, so as to be relieved from the discharge of his duties as such officer. Id. § 416; 1 Dillon, Mun. Corp. § 224, note 2; Id. § 861c; *People ex rel. I. M. R. Co. v. Supervisors*, 100 Ill. 332; *Badger v. U. S. ex rel. Bolles*, 93 U. S. 599; *Jones v. Jefferson*, 66 Tex. 576. And it is further laid down by the authorities that an officer cannot avoid his office by accepting another, unless his office be such as he could determine by his own act, or unless that authority concur in the new appointment which could accept the surrender of, or amove from, the old one. Mechem, Pub. Off. § 421; Throop, Pub. Off. § 30; *Worth v. Newton*, 10 Exch. 247; *Rex v. Patterson*, 4 Barn. & Adol. 1.

We are now led to the inquiry whether, under our statutes, the office of school district treasurer is such a one that he continues in office until his successor is chosen and has qualified, and whether it can be completely determined by his own act. The proposition is admitted that under sec. 961 he may resign at pleasure. Sec. 962 says: "Every office shall become vacant on the happening of either of the following events: 1. Death of the incumbent. 2. His resignation," etc. Standing together, and unaffected by other provisions, the conclusion would seem plain that such an officer might resign at will, and, when his resignation had been presented to the proper officers, his office became vacant. But, turning to other provisions of the statute that bear upon the situation, we find that they conflict with this conclusion, and the whole, therefore, must receive judicial construction. Thus, sec. 431 says the officers of a school district shall hold office for three years, "and until their successors have been elected or appointed, but not beyond ten days beyond the expiration of their term of office without being again elected or appointed." Turning now to sec. 443, we find it dealing with the treasurer alone. It says that within ten days after

his election or appointment he shall file a bond, to be approved by the director and clerk. Then it declares, "*He shall hold office until his successor be elected or appointed and qualified as herein provided.*" To give these words force and effect according to their plain import, we see at once that they conflict with the conclusion stated as regards the effect of secs. 961, 962; that is to say, the office does not become vacant by resignation until a successor has been chosen and has qualified.

The facts that the legislature singled out the treasurer from the other school district officers, and prescribed that his tenure of office should continue as stated, is indicative of an intent that important public interests should never suffer from there being a vacancy in that office. He is the financial officer of the district, charged with the custody of school moneys, and held to strict accountability therefor. If he may lay down his office by abandonment, acceptance of an incompatible office, or resignation, and thereby completely terminate his office by such acts alone, then there would be intervals when there would be no incumbent of the office. An election or appointment of a successor cannot always occur simultaneously with the act of abandonment or resignation. The election or appointment must be followed by qualification. The statute gives the party so chosen ten days in which to file his bond. If the rule contended for by relator prevails, then there might be a season when there would be no one in the office. There can be no doubt of the legislative intention to provide against such a contingency. The provision that the treasurer should hold office until his successor was chosen and had qualified indicates that intention in no unmistakable way. It is plain, definite, and unambiguous in terms. Being applied to this specific office, also indicates a legislative purpose that must prevail over the general statute as to resignations and their effect. Both cannot stand, except with this construction.

The case of *People ex rel. I. M. R. Co. v. Supervisors*, 100 Ill. 332, is instructive on the general proposition stated, and supports the views herein announced.

If the conclusion mentioned is the true one, then relator's attempt to resign was futile, as not being in accordance with the statute, and his acceptance of the office of clerk did not vacate his office as treasurer. The statute says in express terms that he cannot hold both offices; and, not having lawfully relinquished his former office, his assumption of the duties of clerk was nugatory, and did not affect his status as treasurer. We therefore hold that the common-law rule that acceptance of an incompatible office vacates the former must yield to what seem to us plain statutory provisions of contrary intent.

Sec. 433*a*, which provides that, "when the clerk, director or treasurer shall be and remain absent from the district from which he was elected for a period exceeding sixty days, his office shall be deemed vacant," must be read to harmonize with the other provisions mentioned. Such absence is authority for the proper appointing power to fill the vacancy, and such appointee, when he has duly qualified, succeeds to the office without further action. But, as applied to the treasurer, he shall continue in office, and is charged with its duties and responsibilities, until the event mentioned takes place.

It follows from the conclusions stated that the relator has shown no title to the office sought for, and that the conclusions of the trial court were erroneous.

By the Court.—The judgment of the superior court of Milwaukee county is reversed, and the cause is remanded with directions to enter judgment for the defendant.

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THE OSHKOSH WATER WORKS COMPANY, Appellant, vs. CITY OF OSHKOSH, Respondent.

January 12—February 26, 1901.

Constitutional law: Impairing obligation of contract: Claims against city: Change in remedy: Performance of duty by officers.

1. A law does not impair the obligation of a contract, within the meaning of sec. 12, art. I, Const., if neither party is relieved thereby from performing anything of that which he obligated himself to do; but if either is absolved from performing any of those things such obligation is impaired, whether the absolution is accomplished directly and expressly or indirectly and only as a result of some modifications of the legal proceedings for enforcement.
2. It is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties.
3. Except that its charter provided that moneys should be drawn out only upon the order of the mayor and clerk, duly authorized by the council, and that the council might require any claim to be verified by affidavit, a city, at the time a contract was made with it, was subject to suits upon contract liability like any other person or corporation. A subsequent amendment of the charter, adopted in good faith and with no legislative purpose to defeat or embarrass the collection of just claims, providing that no action should be maintained upon any claim or demand until after it had been presented to and disallowed in whole or in part by the council (failure to pass upon a claim within sixty days being deemed a disallowance thereof), and that a disallowance should be a bar to any action unless an appeal therefrom was taken within twenty days, is *held* not to impair the obligation of the contract although it involved a change in the remedy in the following particulars: (1) service of notice of appeal was to be made upon the clerk in lieu of service of summons upon the mayor; (2) the various steps preliminary to getting the matter into court became jurisdictional and could not be waived or jurisdiction conferred by the city officers: (3) a failure to obtain judgment by reason of errors in procedure or lack of proof, which before would have resulted only in nonsuit, would leave the claimant barred of his claim; (4) a suspension of the right to sue, resulting incidentally from the requirement as to presentation and disallowance of claims; (5) the claimant

on appealing was required to give a bond for costs which must be approved by the city attorney and comptroller, and which could not be amended, so that a mistake therein would be fatal to the cause of action. BARDEEN, J., dissents.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

This is an appeal by the plaintiff from judgment dismissing its complaint, entered on sustaining a demurrer thereto. The complaint alleged the making of a contract between the plaintiff and the defendant on June 18, 1883, for payment to the plaintiff, quarterly, of a certain sum as compensation for supplying the water to hydrants for fire and other city purposes; the construction of waterworks by the plaintiff, in compliance with that contract, on or before October 1, 1884; and the refusal of the city, on demand, to pay the hydrant rental, amounting to $4,085, earned under such contract for the quarter ending October 1, 1898; also the making of a subsequent contract on August 31st for payment of hydrant rentals on certain extensions, the performance thereof by the plaintiff, and refusal by defendant to pay the hydrant rental earned thereunder for the same quarter, amounting to $1,060. The demurrer was on three grounds: first, want of jurisdiction of the person or of the subject of the action; second, that plaintiff has not legal capacity to sue; and, third, that the complaint fails to state facts sufficient to constitute a cause of action.

For the appellant there was a brief by *Hooper & Hooper*, and oral argument by *Moses Hooper*.

John F. Kluwin, for the respondent.

DODGE, J. The only assignment of error argued by appellant is that the court erred in holding that the charter of the city of *Oshkosh* (ch. 59, Laws of 1891) did not, so far as it relates to the contract of June 18, 1883, impair the obligation of the contract. It is contended that said char-

ter does so impair, and therefore contravenes sec. 12, art. I, of the constitution of Wisconsin, which provides: "No bill of attainder, *ex post facto* law, nor any law impairing the obligation of contracts shall ever be passed."

At the time of making the contract of June 18, 1883, the city of *Oshkosh* existed and operated under a charter known as ch. 183, Laws of 1883, the first section of which constituted it "a municipal corporation by the name of the city of *Oshkosh*, and by that name capable of suing and being sued in all courts of law and equity." That charter (sec. 1, subch. VII) provided that moneys "shall be drawn out only upon the order of the mayor and city clerk, duly authorized by vote of the common council;" and by sec. 10, subch. VII, "any account or demand against the city, before acted upon or paid, the council may require the same to be verified by affidavit, except salaries and amounts previously fixed or determined by law." Except for these restrictions upon the payment of money, the city of *Oshkosh* was subject to suits upon contract liability like any other person or corporation.

In 1891 was enacted a revised charter (ch. 59, Laws of 1891), continuing substantially the provisions formerly existing in the first section and in secs. 1 and 10, subch. VII. That charter, however, contained a subchapter XXI. It provided:

"Sec. 4. No action shall be maintained by any person against the city upon any claim or demand until such person first shall have presented his claim or demand to the common council for allowance, and the same shall have been disallowed in whole or in part; provided, that the failure of such common council to pass upon such claim within sixty days after the presentation of such claim shall be deemed a disallowance thereof.

"Sec. 5. The determination of the common council disallowing in whole or in part any claim shall be final and conclusive, and a bar to any action in any court founded on such claim, unless an appeal shall be taken from the decision of such common council as in this act provided."

Sec. 6 provided for the appeal in case of disallowance in whole or in part, to be accomplished by serving a written notice of the appeal on the city clerk within twenty days after the disallowance of the claim, and by executing a bond to the city in the sum of $150, with two sureties to be approved by the city attorney and comptroller, conditioned for the faithful prosecution of the appeal and payment of costs; whereupon the clerk is required to transmit the decision and a brief statement of the proceedings and all papers to the clerk of the circuit court of the county, where "such case shall be entered, tried, and determined in the same manner as cases originally commenced in said court," costs to be recovered by plaintiff in case of an increase in the recovery.

This amendment of the charter of *Oshkosh* was but one of many such amendments to city charters occurring at about that time, significant of a marked change of legislative policy with reference to enforcement of money demands against cities. That policy was signified by its adoption in the general city charter promulgated by the legislature of 1889 for cities thereafter to be organized. That policy has been considered by this court in a series of decisions which it is believed have fully recognized and emphasized it. We have held that the preliminary steps are jurisdictional, and that unless complied with the court fails to acquire jurisdiction of the subject matter; that the various steps are mandatory, and cannot be waived by the officers of the city, nor can jurisdiction be conferred by such officers (*Telford v. Ashland*, 100 Wis. 238; *Oshkosh W. W. Co. v. Oshkosh*, 106 Wis. 83); that the bond cannot be amended nor a new bond given after the expiration of the twenty days (*Oshkosh W. W. Co. v. Oshkosh, supra*).

It is, of course, obvious that the amendment of the charter does not expressly and directly affect the obligation of any existing contracts. It is a change of the law regulat-

ing the remedy, and obviously, too, with only that purpose in view. The question, therefore, which is presented before us, is whether, as to claims which have not been allowed by the council (for there is no allegation that this has been allowed), the change in the methods open to a creditor of the city for the adjudication and recovery of such claim is such that, although acting directly only on the remedy, it necessarily impairs the obligation of the contract itself.

We here enter a field redundant of learned discussion, philosophy, and decision, in which, as remarked by Mr. Justice SHIRAS, the very frequency of decision would appear to have rendered it difficult to apply the result of the court's deliberations to new cases, differing somewhat in their facts from those previously considered. *Barnitz v. Beverly*, 163 U. S. 121. Several general propositions are, however, settled so as to require in new cases merely their application. First and most primary among these is that an act which in any degree, no matter how slightly, modifies the obligation of the contract by attempting to relieve the one party from any duty by the contract assumed, is repugnant to the constitutional prohibition. This rule applies to "legislation which affects the contract directly, and not incidentally, or only by consequence." *Von Hoffman v. Quincy*, 4 Wall. 553. Another general rule early established is that over mere remedial procedure the power of the legislature is absolute; that laws regulating it involve so much the consideration of public convenience and welfare that individuals cannot be conceded vested rights therein. For example, it would be intolerable that new laws regulating place or frequency of the sitting of courts could not be enacted and be effective generally, even as to pre-existing rights of individuals, although remotely they affect those rights by adding inconvenience or delay to their enforcement.

It is obvious, however, that rights, whether contractual or other, are so dependent for their value upon the means of enforcing them that for all practical purposes their extinction may be accomplished by laws which, in form, affect only the remedy. It matters little whether it be enacted that certain debts are extinguished or merely that they shall not be enforceable in any forum. In either case the legally binding obligation to pay is destroyed. One of the best actual illustrations of such a result is exhibited by *Cornell v. Hichens*, 11 Wis. 368, where was considered an enactment that in any suit on negotiable bonds and mortgages given to a railway company, although brought by an innocent holder for value, the defendant might answer, alleging misrepresentation in procurement or want of consideration; that such issue should then be tried by a jury; and that, if the jury found such fact to exist, judgment should be entered for the defendant. That law ostensibly regulated the remedy only, the pleadings and procedure in the course of a suit, but its direct and obvious intention and result was to absolve the defendant from his promise, by law embodied in the negotiable bond, that he would pay the amount to any *bona fide* holder, even though it had been obtained from him by misrepresentation or without consideration,—a result prohibited by the constitution.

In attempted recognition both of the necessity for freedom of general legislation as to remedies and procedure and of the constitutional inviolability of the obligation of contracts, the courts early sought middle ground on which both rights might be protected. In Wisconsin, the limits of that middle ground have received definition in a multitude of cases, important among which are the following: *Lightfoot v. Cole*, 1 Wis. 26, 33; *Von Baumbach v. Bade*, 9 Wis. 559; *Starkweather v. Hawes*, 10 Wis. 125; *Cornell v. Hichens*, 11 Wis. 368; *Streubel v. M. & M. R. Co.* 12 Wis. 67; *Oatman v. Bond*, 15 Wis. 20; *State ex rel. Soutter v. Common Council*

of Madison, 15 Wis. 30; *Paine v. Woodworth*, 15 Wis. 298; *Hasbrouck v. Shipman*, 16 Wis. 296; *Selsby v. Redlon*, 19 Wis. 17; *Nelson v. Rountree*, 23 Wis. 367; *Sydnor v. Palmer*, 32 Wis. 406, 410; *N. W. M. L. Ins. Co. v. Neeves*, 46 Wis. 147; *Lee v. Buckheit*, 49 Wis. 54; *Rosenthal v. Wehe*, 58 Wis. 621; *Hall v. Banks*, 79 Wis. 229; *Second Ward S. Bank v. Schranck*, 97 Wis. 250; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488; *Eau Claire Nat. Bank v. Macauley*, 101 Wis. 304.

In *Lightfoot v. Cole*, 1 Wis. 26, 34, in discussing a statute which abolished the pre-existing common-law and equitable suits on claims against insolvent estates, and substituted in lieu a presentation and hearing before commissioners appointed by probate court, this court, by CRAWFORD, J., declared: "It was entirely within the control of the legislature to prescribe and modify the remedies which might be pursued in the courts of the territory, and to provide one particular manner of proceeding, to the exclusion of others, *so long as some specific remedy was preserved.*"

The subject received more thorough consideration in *Von Baumbach v. Bade*, 9 Wis. 559, where was presented a law providing that, in suits to foreclose mortgages, defendant should have six months to answer before default, instead of twenty days, and that notice of sale should be published six months, instead of six weeks, as theretofore required. The rule under consideration was there laid down (page 577), by DIXON, C. J., as follows: "It being determined that the remedy, or laws for enforcement of a contract existing at the time it is made, enter into it and form a part of its obligation, it might perhaps be supposed that any repeal, change, or amendment of such remedy, or laws which in any manner delayed or rendered the enforcement of the contract less complete and effectual, would be unconstitutional and void. But such is not the case. All the authorities agree that it is within the power of the legislature to repeal,

amend, change, or modify the laws governing proceedings in courts, both as to past and future contracts, so that they leave the parties a substantial remedy, according to the course of justice as it existed at the time the contract was made." The court also adopted the following language from *Bronson v. Kinzie*, 1 How. 311: "Although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy, or directly on the contract itself. In either case, it is prohibited by the constitution."

This subject received renewed careful attention in the recent cases of *Second Ward S. Bank v. Schranck*, 97 Wis. 250, and *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488, where the rule of *Von Baumbach v. Bade* was substantially reasserted, it being said in elucidation thereof by PINNEY, J.: "Any legislation, though acting merely on the remedy, that substantially impairs or lessens the value of a contract, is forbidden by the constitution, and therefore void."

The latest declaration of the rule on this subject by the supreme court of the United States is found in *McCullough v. Virginia*, 172 U. S. 102, 124, as follows: "It is equally well settled that changes in the forms of action and modes of proceeding do not amount to an impairment of the obligations of a contract, if any adequate and efficacious remedy be left."

It is conceived that the various forms of expression adopted are intended to express the same idea, namely, that, if neither party is relieved from performing anything of that which he obliged himself to do, the obligations of the contract are

not impaired; but, if he be absolved from performing any of those things, such obligations are impaired, whether the absolution is accomplished directly and expressly, or indirectly and only as a result of some modification of the legal proceedings for enforcement. As the subject is in every case an important one, and as the attempts of different writers and jurists to express the true rule thereon do not entirely agree, and, at best, seem to be capable of different interpretations, it has seemed to me advisable, even at the expense of considerable space, to bring together the concrete instances of application of that rule by this court and by the supreme court of the United States, which is, of course, the ultimate authority. The following are substantially all of the important cases in this court, and the most typical of those in the United States supreme court, which are valuable illustrations under the rule we are now considering:

A statute cutting off all ordinary and common-law proceedings previously existing for enforcement of claims against executors when the estate was insolvent, and prescribing a special remedy by presentation and proof before commissioners of the probate court, and ratable sharing in the assets, *held* within the power of the legislature because some specific remedy was preserved. *Lightfoot v. Cole*, 1 Wis. 26.

An act changing the time for answer and default from twenty days to six months in foreclosure actions, and changing notice of sale from six weeks to six months, *held* not to impair the obligation of pre-existing mortgages. *Von Baumbach v. Bade*, 9 Wis. 559.

The same act *held* applicable to sales under pre-existing judgments, and sustained. *Starkweather v. Hawes*, 10 Wis. 125.

A law giving a laborer for railroad contractors right of recovery against the company, amended after performance of

work so as to take away that right, *held* not to impair the contract of indebtedness between the laborer and his employer, but merely to take away one of two remedies, leaving still an adequate remedy against his debtor. On rehearing, it was concluded that the earlier statute created a contract between the laborer and the railroad company, and the obligation of such contract was by the later act impaired because the only remedy was destroyed. *Streubel v. M. & M. R. Co.* 12 Wis. 67.

Change of procedure in method of acquiring and enforcing log liens not unconstitutional, as applied to existing claims. *Paine v. Woodworth*, 15 Wis. 298.

Statute validating executions under justice of the peace judgments *held* constitutional. *Selsby v. Redlon*, 19 Wis. 17.

A statute enacted after a judgment in ejectment, taking away the pre-existing right, of course, to a motion and order for a new trial, *held* matter of remedy only and valid. *Sydnor v. Palmer*, 32 Wis. 406.

Change of procedure for foreclosure of mortgages, whereby, instead of an immediate personal judgment, to be followed by an immediate sale subject to one year's redemption, there was only permitted a judgment postponing the sale for one year, and allowing a personal judgment only for the deficiency to be ascertained after such sale, *held* to merely regulate the remedy and not impair obligations of the mortgage. *N. W. M. L. Ins. Co. v. Neeves*, 46 Wis. 147.

A statute imposing additional terms on change of venue, *held* goes only to remedy, affects pre-existing actions, and not unconstitutional. *Lee v. Buckheit*, 49 Wis. 54.

Change of practice as to mechanics' lien from law to equity, with substantial alteration as to form of judgment, method of sale, etc. (ch. 143, R. S. 1878), *held* applicable to pre-existing claims. Constitutionality apparently never questioned. *George v. Everhart*, 57 Wis. 397.

Existing law made validity of attachment depend on suffi-

ciency of accompanying affidavit. Subsequent statute permitting attachment to stand on amended affidavit afterwards filed, *held* remedial only, and to apply to pre-existing contracts and suits. *Rosenthal v. Wehe*, 58 Wis. 621.

Abolition of imprisonment for debt *held* no impairment of contract. *Sturges v. Crowninshield*, 4 Wheat. 122; *Penniman's Case*, 103 U. S. 714.

Reasonable additional exemptions from execution do not impair obligation of contract. *Bronson v. Kinzie*, 1 How. 311, and *Edwards v. Kearzey*, 96 U. S. 595, 604 (opinions HUNT and CLIFFORD, JJ.; *contra*, SWAYNE, J.).

Statute changing the law, by requiring that suit on notes owned by banks be brought in the name of the cashier, does not impair the obligation of contracts. *Crawford v. Branch Bank*, 7 How. 279.

Existing law as to sale of decedent's real estate required it to be at public, open sale, on full notice, and new law authorized a private sale under direction and approval of the court. *Held*, no impairment of existing contracts between estate and its creditors. *Florentine v. Barton*, 2 Wall. 210.

Imposing a notice as a condition of taking out tax deed *held* no impairment of contract embodied in the certificate. *Curtis v. Whitney*, 13 Wall. 68, affirming *Curtis v. Morrow*, 24 Wis. 664.

Where charter of corporation required service of process on its president, a subsequent statute authorizing service on other officers *held* not to impair the contract. *Railroad Co. v. Hecht*, 95 U. S. 168.

Statutes of limitation, provided reasonable time is allowed for commencement of suit. *Terry v. Anderson*, 95 U. S. 628; *Koshkonong v. Burton*, 104 U. S. 668; *Mitchell v. Clark*, 110 U. S. 633; *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301.

Under pre-existing law, state bank bills were made receivable for taxes. Taxpayer could compel receipt by *mandamus*, or have other common-law remedies. New law

prohibited their receipt, and also prohibited any process to compel it, and denied all remedy, except to allow payment under protest after tendering the bank bills, and a suit substantially against the state to recover back; the judgment to be enforceable only by entitling claimant to a comptroller's warrant, payable when funds were in state treasury. *Held* that, an adequate remedy being given, there was no impairment of the obligations of the contract resulting from the cutting off of the former existing remedies. *Tennessee v. Sneed*, 96 U. S. 69; *Antoni v. Greenhow*, 107 U. S. 769; *McCullough v. Virginia*, 172 U. S. 102, 124.

Nor did impairment result from a later statute repealing that above mentioned, whereby the existing remedy of suit against the state was taken away, and common-law remedies revived. *McCullough v. Virginia, supra.*

A statute subsequent to the issue of bonds prohibited *mandamus* or other process against individual officers of a city to enforce judgment, and also prohibited execution, and substituted as the sole remedy a registration of the judgment, accompanied by a duty on the city officers to pay out of first available money. *Held*, adequate remedy for enforcement of pre-existing debts, and not unconstitutional; reserving power of court to compel city to provide money if it failed to do so in the next succeeding tax levy. *Louisiana v. New Orleans*, 102 U. S. 203.

Under pre-existing law of Louisiana, minors, etc., had tacit mortgages on the property of their guardians and tutors. A subsequent act denied validity to such tacit mortgages unless registered, allowing less than a year for registration of existing ones. *Held*, valid for the reason that it left an adequate remedy. *Vance v. Vance*, 108 U. S. 514, 518.

Law authorizing service of process on mayor or clerk may be changed to require service on the mayor without impairing obligation of prior contracts. *Perkins v. Watertown*, 5 Biss. 320.

Ch. 49, Laws of 1858, made fraud in procuring railroad farm mortgages or want of consideration an absolute defense in suit, even by an innocent holder for value. *Held*, to impair the obligation of the contract. *Cornell v. Hichens*, 11 Wis. 368.

Ch. 88, Laws of 1861, greatly modified the remedy upon farm mortgages to corporations. It required security for costs; deprived parties of trial before court, substituting a referee, with extremely dilatory procedure before him; gave intermediate appeal on rulings as to evidence, with stay; extended the time for appeal four years, with stay meanwhile, apparently without bond; provided that no title should be acquired on the sale under any judgment until that time for appeal expired; provided that such sale should be of no effect in case of reversal; denied the right to any deficiency judgment; denied plaintiff right of appeal until he had paid all costs; required suit on the note or bond alone to be in the county where the mortgaged premises were situated; declared that the plaintiff should be deemed to hold the security *prima facie* with full notice of all equities; stayed all sales under power of sale in the mortgage, in case misrepresentation or want of consideration were alleged, until such issue should be finally determined; and deprived the plaintiff of all other remedies except those specified in the chapter. This act was held to so burden the remedy as to impair the obligation of the contract. The court said that several of the detailed provisions, taken alone,—as, for example, the requirement of security for costs,—would not of themselves have that effect, but that the purpose of the act was so obviously to embarrass, restrict, and postpone the enforcement of these mortgages according to their terms that it must be held void. *Oatman v. Bond*, 15 Wis. 20.

A law authorizing the issue of certain city bonds required the levy of a tax to meet the same. A subsequent act pro-

hibited the city from raising any taxes, except for each year's interest as it accrued. *Held*, unconstitutional so far as it prohibited a tax to meet judgments on previously defaulted interest. *State ex rel. Soutter v. Common Council of Madison*, 15 Wis. 30.

Suspension of all process against volunteers "during service" *held* to impair the obligation of the contract, because it deprived the creditor of all remedy for an indefinite period,— as the court said, "five, ten, or twenty years." *Hasbrouck v. Shipman*, 16 Wis. 296. The contrary has been held in other states, where the suspension was not indefinite. *McCormick v. Rusch*, 15 Iowa, 127; *Breitenbach v. Bush*, 44 Pa. St. 313; *Clark v. Martin*, 49 Pa. St. 299.

Statute making order of publication proof of sufficiency of grounds therefor *held* not constitutional as applied to preexisting void judgments. *Nelson v. Rountree*, 23 Wis. 367.

Statute giving subcontractor's lien limited by the amount of the owner's debt to the contractor, changed to make owner liable without limit, *held* to modify the obligation of existing contract between owner and building contractor, and therefore unconstitutional. *Hall v. Banks*, 79 Wis. 229.

Statute giving debtor power to vacate the lien of an execution or attachment by making assignment within ten days thereafter impairs obligation of existing contracts and is unconstitutional. *Second Ward S. Bank v. Schranck*, 97 Wis. 250; *Peninsular L. & C. Works v. Union O. & P. Co.* 100 Wis. 488; *Eau Claire Nat. Bank v. Macauley*, 101 Wis. 304.

Statute prohibiting sale, under power contained in a mortgage, for less than two thirds of an appraisal, and giving one year for redemption, *held* to impair the obligation. *Bronson v. Kinzie*, 1 How. 311.

Law staying execution of a judgment or enforcement of a contract impairs the obligation. *Barnitz v. Beverly*, 163 U. S. 118, and cases there cited.

Laws requiring that negotiable coupons from existing state bonds must, before receipt for taxes, be accompanied by principal bond, and that their genuineness be established without expert evidence, *held* to impair obligation. Production of principal bond inconsistent with contracted negotiability of separate coupons. Expert evidence only way to prove genuineness of printed coupons, and its exclusion worked complete repudiation. Intent to repudiate the coupons was obvious, and above provisions only parts of general scheme. *McGahey v. Virginia*, 135 U. S. 685.

In the light of the general rules on the subject, and the foregoing illustrations of their application, we turn to an examination of the changes in procedure for enforcement of claims not allowed by the council, accomplished by amendment of defendant's charter. Under the former law, jurisdiction of the court could be invoked by service of summons, which, if accompanied by complaint, the city must answer within twenty days, except for extension of time in discretion of court. Defects in summons or service thereof could be waived by voluntary appearance. Mistakes in procedure whereby plaintiff failed of hearing on the merits usually worked only nonsuit, and he might sue again, subject only to statute of limitations. In contrast with this procedure, it is pointed out that under the charter of 1891 the plaintiff, before invoking jurisdiction of any court, must file his claim with the city clerk, and must await examination by the comptroller, and action of the council disallowing it, which may postpone him sixty days, instead of twenty. Further, in order to reach a judicial forum, he must give security for costs in a form prescribed by law, and with sufficient sureties. He must obtain approval of the sureties by the city attorney and comptroller. Practically, he must do this within twenty days, appellant contends; for, if a new bond be rendered necessary by a disapproval, that must be filed within that period from the

disallowance of the claim. No method for coercing the action of these officers is expressly provided. Appellant also suggests the possible absence of either, casual or intentional, as a contingency burdening a claimant's chances of reaching the court. Lastly and most urgently, counsel dwells on the asserted inability to correct any mistakes by amendment, and on the fatal effect of any such mistakes, not only on the action, but upon the cause of action as well.

Some of these changes are too immaterial to require extended comment. Service of notice of appeal on the city clerk in lieu of service of summons on the mayor is so. Nor are we impressed with the importance of the asserted inability of a claimant to cure defects in procedure by amendment. It can hardly be said that there is any vested right to make mistakes. A variance of policy as to liberality in permitting amendment cannot be said to impair the obligation of any contract. A law permitting amendment of attachment affidavit has been held valid as to existing contracts and actions. *Rosenthal v. Wehe*, 58 Wis. 621. Why not the converse? The fact that a failure to obtain judgment by reason of errors in procedure or lack of proof, which in ordinary practice would result only in nonsuit, leaves claimant barred of his claim, no more affects the obligation than does a statute of limitations leaving reasonable time to sue, but expiring before the defectiveness of an attempted suit is discovered. It certainly comes no nearer such obligation than does an act taking away one's right to a second trial as of course after a judgment in ejectment. *Sydnor v. Palmer*, 32 Wis. 406.

Perhaps the most cogent of appellant's objections to the new procedure is that there is a period of suspension of his right to sue, resulting from the requirement that he must first present his claim to the council and await its disallowance. It is by no means certain that such obstacle is a new one. It has been held that the statute (secs. 79, 80, ch. 15,

R. S. 1858) requiring claims to be presented to town boards of audit before they could be paid, impliedly prohibited suit until that had been done. *Putnam v. Rubicon*, 32 Wis. 498. That statute is not very obviously distinguishable from the requirements of the *Oshkosh* charter of 1883, either in the procedure indicated or the legislative purpose to be accomplished. It is not, however, necessary to decide upon their identity at this time. It will be observed that while unconstitutionality has been ascribed to legislation which directly postponed the ultimate acts for the enforcement of a contract right, as by staying execution or creating or extending period of redemption from judicial sales (*Barnitz v. Beverly*, 163 U. S. 118), no case has been cited to us, and none discovered, where reasonable delay, resulting incidentally from the requirement of certain new steps in procedure, or from enlargement of time for taking such steps, has been held fatal, provided such legislation did not clearly appear to be in bad faith and for the purpose of defeating or impairing the very obligations of the contract. On the other hand, such modifications of proceedings imposing either increased burdens or increased time have been recognized as legitimate exercise of legislative power over remedies and procedure. *Von Baumbach v. Bade*, 9 Wis. 559; *Starkweather v. Hawes*, 10 Wis. 125; *Lee v. Buckheit*, 49 Wis. 54; *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301; *Vance v. Vance*, 108 U. S. 514; *Clark v. Martin*, 49 Pa. St. 299. In addition to these instances, it is worthy of note that very many such enactments have been enforced without challenge, some of them since very early days; thus adding the tacit consensus of legislature, courts, and the profession to a construction of the constitution which permits them. Among such may be noted the adoption, with reference to claims against counties, of the same policy as that with reference to cities, now complained of (secs. 676, 682, 683, Stats. 1898); the postponement of suits against towns until after presentation

and consideration of claim (sec. 824); the stay laws for purposes of reassessments (sec. 1210*b*; *Plumer v. Marathon Co.* 46 Wis. 163); and many others. The requirement that before invoking judicial action the claimant must submit his claim to consideration of the common council is not a serious burden upon him. In practical affairs the instances are rare, if not unknown, that a claimant commences suit until he has first invited payment without suit. The effect of the charter of 1891 is to limit, not enlarge, the period necessary to constitute a demand and refusal of payment. In the matter of demands against municipalities the importance of momentary opportunity to sue is far less than with individual debtors, who during even a few days may by transfer of property or otherwise become execution proof, and thus defeat the purpose of an action.

The only remaining obstacle to judicial hearing and enforcement which appellant urges upon our attention is the requirement of a bond for costs in the sum of $150. This is in itself hardly a new burden; for our practice statutes have since long prior to 1883 subjected plaintiffs to a security for costs, in the discretion of the court, in still larger amount. Independently of this view, however, the absolute requirement that a plaintiff shall furnish reasonable security for costs, as prerequisite to suit, cannot be considered so completely a denial of adequate remedy as to impair the obligation of existing contracts. It is a very usual requirement of practice statutes and rules. If our statutes were changed so that such a preliminary were absolutely required by law for all suits, instead of being permissibly required by the court as now, we apprehend there could be no doubt that such change is within the legitimate control of the legislature over procedure. Such is the suggestion in *Oatman v. Bond*, 15 Wis. 20. But counsel urges that the bond is not amendable, and a mistake therein is fatal to the cause of action. The answer to this suggestion

is that no mistake need be made. The charter, in terms easy of comprehension if carefully read, prescribes what the bond shall be, and compliance therewith is not difficult. A law which lays out a plain and adequate course for one to secure judicial enforcement of his contract does not impair the obligation because one straying out of the prescribed path cannot reach the goal. But, again, counsel says the statutory requirement that the bond be approved by the city attorney and comptroller renders it possible for those officers, either wilfully or by neglect, to exclude him from his remedy in court. Whether this be so has not yet been decided. If an appellant files a good and sufficient bond in compliance with law, it is by no means certain that the courts cannot coerce proper action of such city officers, at least so far as is possible without invading the field of their discretion. But it is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. The duty of the city attorney and comptroller to approve a proper bond is one cast on them by law, for breach of which one injured may have his remedy, as well as against the sheriff on whom he must depend for enforcement of an execution. All remedies depend upon performance of duty by public officers, and by breach thereof may fail. That is true even of the privilege of action in the courts, wherein breach of duty by the judge might most effectually postpone or entirely defeat the claim; but such possibility does not render the remedy inadequate.

That the change of legislative policy as to procedure upon claims against *Oshkosh* and many other cities was adopted in the utmost good faith, with no legislative purpose other than promotion of public welfare and proper protection of public funds against unlawful demands, cannot be doubted. *Putnam v. Rubicon*, 32 Wis. 498; *Seegar v. Ashland*, 101 Wis. 515. It is the duty of the courts to uphold and en-

force such deliberately adopted and important changes of policy, unless it appears clearly and beyond all reasonable controversy that the legislative power has been exceeded. *Adams v. Beloit*, 105 Wis. 363, 373. After careful consideration of the changes wrought by the amendment of 1891 to the *Oshkosh* charter, we are unable to say with the requisite certainty that the legislature has transgressed the bounds to its authority over remedies and procedure by so modifying them as to relieve the city from any obligation resting upon it by reason of the contract with plaintiff, or to so diminish the remedy as to render those obligations substantially less valuable. We, therefore, are bound to enforce the law as it is written, and affirm the decision of the trial court in sustaining the demurrer to the complaint.

By the Court.—Judgment affirmed.

BARDEEN, J. The obligation of a contract, in a constitutional sense, is the means provided by law by which it can be enforced. Whatever lessens the efficacy of this means, or tends to postpone or retard the enforcement of the contract, impairs the obligation. *Louisiana v. New Orleans*, 102 U. S. 203, 26 L. Ed. 132, and note; 9 Notes U. S. Rep. 1069; Baker, Ann. Const. U. S. 68. The remedies afforded by existing laws enter into and form a part of the obligation of a contract. The legislature has a right to change such remedies, and modify the laws governing procedure in court, if it leaves the party a substantial remedy according to the course of justice as it existed at the time the contract was made. *Sturges v. Crowninshield*, 4 Wheat 122. One of the tests that a contract has been impaired is that its value has by legislation been diminished. It is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force. *Planters' Bank v. Sharp*, 6 How. 301. The substantial question in this case is whether the new

charter so affects the remedy as to impair the obligation of plaintiff's contract and render it less valuable. I cannot persuade myself that it does not. The conditions and restrictions thrown around the attempt to get into court are so complex and indefinite, and are to be followed with such nicety of exactness, at the peril of losing the remedy entirely, and are so completely different from those in existence when the contract was made, that in my opinion they so lessen the efficacy of the remedy, retard its enforcement, and diminish its value as to come within the condemnation of the constitution. I refer particularly to those charter provisions as to when the time within which an appeal must be taken commences to run, and the requirements relating to the giving and approval of a bond. The latter provisions seem to me to be of especial significance. The appellant must take its appeal, get its bond, and secure the approval both of the city attorney and city comptroller in twenty days, or its rights are forfeited. The charter contains no provisions regarding the responsibility of the sureties, does not say what the appellant must do to satisfy the city attorney and comptroller as to the sufficiency of the bond, but leaves it entirely to those officers to approve or not, at will. If, perchance, one of those officers should be absent from the city during the time the right to appeal is running, the appeal is lost. The old charter contained no such technical or drastic conditions. There are several other changes which to my mind tend to lessen the value of the contract and to postpone and retard its enforcement, but I need not mention them at length. The impression in this regard is so strong that I cannot agree with the conclusion of the majority of the court.

HOERNIG, Appellant, vs. HOERNIG, Respondent.

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112 322

January 14—February 26, 1901.

Divorce: Cruel and inhuman treatment: Division of estate.

1. In an action by a wife for divorce on the ground of cruel and inhuman treatment it appeared that the net amount of property of the parties, over and above indebtedness, was $17,100, much of which had been accumulated in a business which the plaintiff had assisted in managing. Out of this the court awarded her $3,000, apparently in repayment of $1,500 put into the business by her several years previously, the homestead, worth $6,000, and her interest as beneficiary in an insurance policy worth $500. It also provided for the payment to her of $150 annually during the minority of an eight-year-old son whose custody had been awarded to her. *Held*, that the plaintiff had no just ground of complaint.
2. Where adultery was not alleged in the complaint in a divorce action, but facts from which, if true, a strong inference of adultery would arise were stated simply as acts of cruel and inhuman treatment, the court refused to find specifically as to such acts, but found generally that cruel and inhuman treatment was proven. *Held*, not prejudicial to plaintiff.

APPEAL from a judgment of the circuit court for Winnebago county: GEORGE W. BURNELL, Circuit Judge. *Affirmed.*

This is an action of divorce, brought by the wife on the ground of cruel and inhuman treatment. The divorce was granted, and the property of the parties divided, and the plaintiff appeals from that part of the judgment making division of the property and fixing the amount to be paid the plaintiff for the support of the son of the parties.

The facts were that the parties were married in 1884. One son, Carl Hoernig (still living), was born in 1892, as the issue of the marriage. The defendant was the proprietor of a meat market when the parties were married, and possessed a store building in Oshkosh, worth $8,000. The plaintiff had no property. Soon after the marriage, the plaintiff began to work in the meat market, keeping books,

waiting on customers, and having charge of the business during the defendant's absence. There is a dispute between the parties as to whether the plaintiff did this voluntarily or under compulsion, but the court found that she did it voluntarily. Her services were valuable in the business, and it prospered. In December, 1890, the defendant, in anger, struck and choked the plaintiff, and she left the defendant and went home to her parents; but in a few days, however, she returned on defendant's promise of kindness in the future, and continued to assist in the meat-market business as before. In 1893 the defendant went into the distilling business (his wife still managing the meat market), and lost nine or ten thousand dollars in it. Afterwards he went into the business of manufacturing caskets, and lost a thousand dollars in that. The meat-market business was successful, however, and some property was accumulated. The plaintiff claims, and the court found, that in 1894 and 1895 the plaintiff received from her father $1,500, and invested it in the defendant's business. The plaintiff also claims, and the court found, that the defendant continued to treat the plaintiff in a cruel and inhuman manner after her return in 1890, rendering it unsafe and improper for the plaintiff to live with him. She finally left the defendant in June, 1899, when she went to live with her parents at Fond du Lac, taking her young son with her.

At the time of the trial of the action the parties owned real estate in Oshkosh, the title to all of which was in the plaintiff, as follows: A homestead, worth $6,000; a store, called the "Carr Bros. store," worth $9,000 (both of these parcels were covered by a mortgage for $5,500); another store, called the "Pelton store," worth $8,000, and mortgaged for $7,000; three other parcels of real estate, not mortgaged, worth, in the aggregate, $4,500. The parties also held three good notes, called the "Athern notes," of the face value of $3,000, which had also been transferred to

the plaintiff. The value of all this property was found by the court to be $30,500. At the same time the defendant had, as the court found, personal property as follows: Good accounts, $3,000; stock in trade, $1,200; fixtures, $400; a life insurance policy, partially paid, worth $500,— making in all $5,100. Thus the total property of the parties, as found by the court (except household furniture of little value), was $35,600, and the mortgage indebtedness was $12,500, in addition to which the court found that the defendant owed $6,000; making a total indebtedness of $18,500, and leaving a net excess of property above indebtedness of $17,100. The proof showed that the homestead was conveyed to the plaintiff in February, 1894, and the balance of the property of which she had title was conveyed to her in August, 1897. The plaintiff claimed that this last conveyance was made by the defendant for the purpose of delaying and defrauding certain creditors, but the court found against this contention. The plaintiff had put nothing into the property except the $1,500 before mentioned and her labor, which is conceded to have been valuable.

Upon these facts the court awarded the custody of the boy to the plaintiff, and directed the defendant to pay the plaintiff $150 per year for his support in semi-annual payments. He also awarded her the three Athern notes as her separate estate, and directed that the defendant assign to her her beneficiary interest in the life insurance policy; also the homestead, free of incumbrances; and directed that the defendant pay off and remove the incumbrance thereon within thirty days, and decreed that said incumbrance be a lien on all the remaining real property until it was discharged by the defendant. The remaining property, real and personal, was awarded to the defendant, and a conveyance of the real property by the plaintiff was directed. It appears that the plaintiff had been receiving rental of the so-called Pelton and Carr stores, and the court ordered that such rents be

paid to her up to January 1, 1900, and after that date to the defendant.

For the appellant there were briefs by *Giffin & Sutherland*, and oral argument by *D. D. Sutherland.*

For the respondent there was a brief by *Freeman & Freeman*, and oral argument by *C. N. Freeman.*

WINSLOW, J. In what respect the plaintiff was wronged by the judgment in this case, we have been unable to perceive. The title to all of the property which stood in her name at the time of the divorce had been derived by her from her husband. It was, therefore, subject to division by the terms of the statute. Stats. 1898, sec. 2364. It is difficult to see how the fact that it may have been transferred in fraud of creditors can affect this right, because it was still property "derived from her husband." But the court found on sufficient evidence that it was not transferred in fraud of creditors; hence the question is not here.

The court gave the wife the Athern notes — $3,000 — apparently in repayment of the $1,500 which she put into the defendant's business in 1894. The net amount of all property over and above indebtedness was $17,100. Deducting the amount of the Athern notes from this, leaves $14,100. Out of this the court gave the plaintiff the homestead, worth $6,000, free of incumbrance. This is a larger proportion of the estate than was allowed by this court in the cases of *McChesney v. McChesney*, 91 Wis. 268, and *Roelke v. Roelke*, 103 Wis. 204, which cases are quite similar in their facts to the case at bar. It does not seem to us that the plaintiff has any just ground of complaint.

It is said that the court erred in refusing to find upon the question of adultery. Examination of the complaint shows that no cause of action for adultery was stated or attempted to be stated. Certain acts of the defendant were stated, from which, if true, a strong inference of adultery would

arise; but it was nowhere alleged that adultery was in fact committed, nor were the necessary allegations negativing plaintiff's connivance, etc., prescribed by Rule XXIX of the Circuit Court Rules, contained in the complaint. The acts alleged were plainly stated simply as acts of cruel and inhuman treatment. The court refused to find specifically as to these acts, but found generally that cruel and inhuman treatment during the continuance of the marriage was proven. We find no prejudicial error in this.

By the Court.—Judgment affirmed.

THE STATE, Respondent, vs. CHILDS, Appellant.

109 233
110 *356

January 16 — February 26, 1901.

(1, 2) *Collection of forfeitures: Justices' courts: Jurisdiction: Complaint.*
(3) *Highways on town lines: Apportionment: Control.*

1. Under sec. 3298, Stats. 1898, a formal complaint is not necessary to give a justice of the peace jurisdiction to issue his summons in an action to collect a forfeiture, but it is sufficient if one of the officers there named, in writing, calls the attention of the justice to the fact that a person within his jurisdiction is liable to a certain penalty and directs the collection thereof by an action before such justice.
2. Under sec. 3295, Stats. 1898 (providing that in actions by the state to recover forfeitures "it shall be sufficient to allege in the complaint, that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute which imposes it, specifying the section," etc.), a complaint alleging a liability under a section which imposes a penalty for the doing of either of two acts is sufficient, although the specific act relied on is not stated. If the defendant cannot say from the complaint alone what he is required to meet, he should request the court to require the plaintiff to elect upon which branch of the statute it will rely.
3. A town to which a specific part of a town-line highway has been apportioned to make and maintain, pursuant to sec. 1273, Stats.

1898 (providing that a "town shall have all the rights and be subject to all the liabilities in relation to the part of the highway to be made or repaired" by it as if it were wholly located therein), has exclusive jurisdiction throughout the entire width thereof for that purpose, no exception being made as to territory in the adjoining town which is common to such highway and an ancient highway which crosses it.

APPEAL from a judgment of the county court of Winnebago county: C. D. CLEVELAND, Judge. *Reversed.*

Action to recover the statutory penalty for wrongfully filling a ditch constructed for draining water from a highway. The complaint was made by the district attorney of the proper county. It stated that defendant was liable to the state of *Wisconsin* in the sum of $25 according to the provisions of sec. 1326, R. S. 1878. Indorsed thereon was a direction signed by the district attorney for the prosecution of an action to recover the penalty. Such complaint, so indorsed, was filed with a justice of the peace, whereupon a civil action was commenced before such justice, against the defendant, in which such proceedings were thereafter duly had that a judgment was rendered against said defendant for $25 and costs. The case was appealed to the county court, where the answer was amended alleging that the place where the alleged wrong was done was in a duly established town-line highway on the town line between the town of Menasha and the town of Harrison, the former being in Winnebago and the latter in Calumet county in this state, and in that part thereof apportioned to the town of Harrison to make and keep in repair; that the act complained of was done by the direction of the supervisors of the town of Harrison, exercising their authority to maintain and keep such highway in repair; that it was the judgment of said supervisors that the proper condition of such highway required the filling up of the ditch, and that it was filled up accordingly.

When the case came on for trial there was a motion to dismiss, because jurisdiction was not obtained by the lower court for want of proper proceedings before the issuance of the summons, and because the complaint filed was not sufficiently definite and certain to show the particular act claimed to have occurred rendering the defendant liable under the statute. The motion was denied, and defendant excepted. A motion was then made that the plaintiff make the complaint more definite and certain, which was denied. There was then an objection to the reception of any evidence under the complaint, upon the ground that two distinct offenses were mentioned in sec. 1326, R. S. 1878, and that the complaint failed to state the particular offense relied upon. The objection was sustained, and plaintiff was permitted to amend the complaint by alleging that defendant filled up a ditch constructed for draining water from a highway, in the town of Menasha, in the county of Winnebago, at a point near the town of Harrison in Calumet county, and said town of Menasha.

The case was tried by the court and resulted in findings of fact substantially as follows: October 24, 1863, and continuously for a long time prior thereto and subsequently till after the occurrence complained of, a public highway existed, crossing nearly at right angles the town line between the town of Menasha and the town of Harrison. Prior to the date specifically named, that portion of said highway in the town of Menasha was maintained by said town up to the town line between the two towns named. On said day such proceedings were duly had that a town-line road was established on said town line, crossing the highway first mentioned, that part thereof including the point of the crossing of the two roads being apportioned to the town of Harrison to make and keep in repair. On November 4, 1897, the overseer of highways for that part of the town of Menasha including the place where the two roads cross each

other as aforesaid, assuming that said town had exclusive jurisdiction at said point up to the town line for the purpose of maintaining the town road, for such purpose constructed a culvert across such road parallel with and at the proper distance from the center line of the traveled track of and within the limits of the town-line road. Thereafter the supervisors of the town of Harrison, assuming that said town was responsible for the condition of the town-line highway at the crossing of the two ways, and that the maintenance of the culvert rendered said highway less safe and convenient than it otherwise would be, restored the former situation by removing the planks from the culvert and filling up the ditch. The defendant was active in doing the work by the authority of the supervisors of said town of Harrison.

On such facts the trial court held that the jurisdiction of the town of Menasha, as regards the town road, included the entire territory of such town within the limits of the two ways, each four rods wide at the crossing, and was paramount to that of the town of Harrison, and that the act of defendant in filling up the ditch, though he was acting under the direction of the supervisors of said town of Harrison, was unlawful and rendered him liable to the penalty of $25, under sec. 1326, R. S. 1878. Judgment was rendered accordingly, from which this appeal was taken.

For the appellant there was a brief by *Silas Bullard*, attorney, and *J. E. McMullen*, of counsel, and oral argument by *Mr. Bullard.*

J. C. Kerwin, for the respondent.

MARSHALL, J. The motion to dismiss the action upon the ground that the justice did not obtain jurisdiction was properly denied. The motion was based on the idea that the filing with the justice of a formal and sufficient complaint, made by the district attorney of the county or some other

officer authorized to direct the commencement of the action, showing liability of the defendant under the statute, was a condition precedent to jurisdiction to issue the summons. Reliance, in the main, was placed on *State v. Gillen*, 49 Wis. 683. Such case arose while ch. 192, Laws of 1877, was in force. That provided as follows:

"No summons, warrant or other process shall hereafter be issued by any justice of the peace or other officer, in any action to recover a penalty, forfeiture or fine, under the provisions of chapter 155 of the Revised Statutes, unless a complaint shall be made and filed by the district attorney, or the mayor or alderman of an incorporated city or village, or a member of the town board of supervisors residing in the county where such penalty is incurred, with such justice of the peace or other officer, prior to the issuing of such process."

There was no mistaking the meaning of that language, so the court said that the justice failed to obtain jurisdiction, no complaint having been filed as the statute required. Since such case arose the law has been materially changed. Such change dates from the revision of 1878. The condition precedent to the commencement of an action of this character now is as follows:

"No such action . . . shall be brought before any justice of the peace except by direction of the attorney general, district attorney of the county, mayor or alderman of a city, president or trustee of a village, or supervisor of a town, in which the forfeiture is incurred, or other officer specially directed by statute." Sec. 3298, Stats. 1898.

It will be noted that a mere direction by the district attorney for the bringing of the action is all that is required to give a justice of the peace full jurisdiction to issue his summons. No formal complaint is necessary. The statute does not even say that the direction must be in writing, though doubtless good practice requires that it should be. But certainly, if the district attorney, in writing, calls the attention of a justice of the peace to the fact that a person within his jurisdiction is liable to a penalty under sec. 1326,

Stats. 1898, and directs the collection of the same by an action before such justice, the statute is fully complied with. All that was done in this case.

If it were true that a formal complaint, sufficient in every respect and made by one of the officers specified in the statute, is now required to be filed with the justice in order to clothe him with jurisdiction to issue his summons in a case like this, the complaint filed seems to be strictly in accord with sec. 3295, Stats. 1898, which says that "In such actions it shall be sufficient to allege in the complaint, that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute which imposes it, specifying the section and chapter containing such statute." True, the complaint referred to a section of the statute which renders a person liable for a penalty of $25 for doing either of two acts; and a person charged generally under it cannot say from the complaint alone what he is required to meet. Any difficulty in that regard can easily be avoided by a request to the court that the plaintiff elect upon which branch of the statute it will rely. No such request was made in this case, though defendant had all the relief that could have been obtained thereby. After improperly sustaining an objection to the complaint upon the ground that it failed to state a cause of action against the defendant, merely because it was indefinite in that it failed to point out the particular provision of sec. 1326 relied upon, the complaint, by permission, was amended, so as to cover the alleged defect. The complaint should have been treated as sufficient in form, because it followed the statute. Then, if the court concluded that justice required plaintiff's attorney to elect upon which branch of the statute he would proceed, it should have so ordered.

On the merits of the case there is this one question that must be decided: Has a town, to which a part of a town-

line highway has been apportioned to make and maintain pursuant to sec. 1273, Stats. 1898, jurisdiction throughout the entire width thereof for that purpose, to the end that its proper officers may lawfully do those things reasonably necessary, in their judgment, to such construction and maintenance, no exception being made as to territory in the adjoining town which is common to such highway and an ancient highway which it crosses? As indicated in the statement of facts, the trial court answered that in the negative. If that determination be wrong the judgment is erroneous and must be reversed. Very little light can be obtained from decided cases, in deciding such question. It must be tested by the statute (sec. 1273, Stats. 1898) from which whatever power one party to a town-line road possesses within the territory of the other party is derived. It read as follows:

"The said supervisors, upon laying out, altering or widening such highway, shall determine, in their order, what part of such highway shall be made and kept in repair by each town, and what share of the damages, if any, shall be paid by each; and each such town shall have all the rights and be subject to all the liabilities in relation to the part of such highway to be made or repaired by such town as if it were wholly located in such town."

That language, looking only to its literal sense, is too plain to call for or admit of judicial construction. Applying the language in such literal sense to the subject of the law, no absurd consequences are perceived, nor do we find any conflict between it and any other statute. The purpose of the law appears to be that there shall be no divided responsibility as to any part of a town-line highway. That is in accordance with legislative policy generally as regards highways, and with the policy of courts where judicial construction is required to determine questions of conflicting jurisdictions as to such ways. Elliott, Roads & S. (2d ed.), § 453; *Chicago, M. & St. P. R. Co. v. Milwaukee*, 97 Wis.

418, 432–434. The view of respondent's counsel could not prevail without reading into a plain statute a meaning that cannot be reasonably attributed to its language. Courts are not permitted to do that.

The act for which defendant was found guilty would have been lawful if the *locus in quo* were within the territorial limits of the town of Harrison. By the plain mandate of the statute, such place, for the purpose of the performance of the duty of maintaining the town-line road, was a part of said town. Therefore, defendant was not guilty of any wrong. It seems that there is no escaping that conclusion. It is considered that the legislative intent, in requiring the apportionment of town highways between the towns affected, giving to each a specific portion to make and maintain, with the same jurisdiction over it as if it were located wholly within the town upon which the duty is imposed, was to avoid divided responsibility, and that such intent extends as far as necessary to fully accomplish its purpose, viz., to make the town having charge of a part of a town-line highway responsible for the proper condition of that part of such highway common to both ways, and to give it exclusive jurisdiction for that purpose.

By the Court.— The judgment of the county court is reversed, and the cause remanded with directions to render judgment for defendant against the state for costs, said judgment to be paid by Winnebago county. Stats. 1898, sec. 3313.

OPTENBERG, Appellant, vs. SKELTON, Respondent.

109 241
113 12

February 2 — February 26, 1901.

Sales: Breach of warranty: Recouping damages: Appeal: Immaterial error: Judgment, when supported: Fact assumed by trial court as undisputed: Bill of exceptions.

1. The purchaser of a threshing-machine engine warranted to be in good working condition may retain it and recoup against the purchase price the damages which its defective condition imposed upon him, such as for the wastage of time of himself and his threshing crew in the actual effort to use the machine, upon the vendor's solicitation that he do so; for the value of his own time in reasonable efforts to remedy the defects; and for the amount paid for the hire of another engine for a few days to do the work for which the engine would have served had it been as warranted.
2. In such a case the jury, by special verdict, awarded the purchaser damages for loss of earnings, caused by defects in the engine, during the time it was actually operated, but the court rejected the allowance as too remote. *Held*, that the admission of evidence of such damages, and permitting the jury to find thereon, was not prejudicial to the vendor.
3. The trial court in such a case submitted to the jury questions as to the value of the purchaser's time spent in thirteen trips to get the engine repaired and in six days trying to repair it, and included the amounts found by the jury in the judgment, but the question whether so much time was in fact consumed was not submitted. *Held*, equivalent to a decision that it was established without dispute that the amount of time stated in the questions was actually so spent.
4. When the trial court, sitting with a jury, expressly decides an issue of fact, it will be presumed on appeal that its decision was supported by uncontroverted evidence, in the absence of a bill of exceptions certified to contain all the evidence; and the fact so found will be considered in connection with the pleadings and verdict in determining whether the judgment is supported thereby.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

On May 15, 1898, the plaintiff sold to the defendant a second-hand traction threshing engine at the agreed price

of $550, which he warranted to be in good working condition. It was found defective, and the plaintiff, who was a machinist and dealer in such commodities, assured defendant that the defects could be remedied so as to make the engine comply with the warranty. Repeated repairs and alterations were made from time to time under that assertion. The defendant retained the engine, and attempted to use it through the threshing season of 1898, during which he worked with it twenty-seven days. The engine was not in good working order, especially in inability to keep up steam, so that frequent stoppages occurred. Not until after the threshing season, in the following February, did the plaintiff succeed in repairing the defects so as to make the engine meet the warranty. Plaintiff sued for balance of unpaid purchase price, and defendant counterclaimed for special damages resulting from the breach of warranty, the damages claimed in the counterclaim being fifteen trips by defendant to Sheboygan in connection with repairs, $44.50; loss of time of defendant and his crew of threshing help during the threshing season for the purpose of making repairs and to let the engine make steam, and "damages otherwise caused by reason of the defects," $150; expenditure for hire of another engine to complete threshing contracts, $15; and six days' time of defendant in efforts to repair, $9. Defendant tendered judgment for $100, which tender was not accepted.

The case was tried to a jury, and a special verdict taken, in which the balance of purchase price due plaintiff was found, without controversy, at $226.66. The jury found, further, that the engine was less valuable by reason of the noncompliance with the warranty in the sum of $250, and, in answer to specific questions, as follows: (9) During the twenty-seven days of use of the machine, defendant's loss, in wages paid to his men for time in which the work was stopped or suspended because the engine did not furnish the

required steam, was $54; (10) the loss to the defendant on account of the loss of his time during the same period and from the same causes, was $13.50; (11) such stoppage was due to the defective condition of the engine; (12) the value of defendant's time and team for thirteen trips made to get engine repaired was $44.50; (13) the defective condition made necessary the hire of another engine for five days, at $3 per day, $15; (14) the value of defendant's time for six days spent in trying to repair the defects in the engine in question was $9; (15, 16, 17) the diminished earnings during the twenty-seven days in question, by reason of the defects in the engine, were 170 bushels per day, at the price of two and one-half cents per bushel.

On motions for judgment, the court rejected the diminished value of the engine as not within the pleadings, and rejected the loss of earnings, in response to fifteenth, sixteenth, and seventeenth questions, as too remote, but awarded defendant recovery upon his counterclaim for the items found by the ninth, tenth, twelfth, thirteenth, and fourteenth questions, aggregating $136; thus reducing plaintiff's net recovery to $90.66, being less than the amount of the tender of judgment, so that by balancing of costs a net judgment of $4.91 was rendered in favor of the defendant, from which the plaintiff appeals.

For the appellant there was a brief by *Andrew Gilbertson* and *C. H. Maynard*, and oral argument by *Mr. Gilbertson*.

For the respondent the cause was submitted on the brief of *Simon Gillen*.

DODGE, J. By reason of the fact that the bill of exceptions is not certified to contain all of the evidence, we are unable to consider several of the assignments of error, especially those which assail the answers to certain questions in the special verdict as contrary to the evidence, and that which assigns error for refusing to direct a verdict in plaintiff's favor.

The first, fourth, and eleventh assignments of error are predicated on the admission in evidence and submission to the jury of the question of loss of profits, or, rather, loss of earnings of the engine, during the time it was actually operated, by reason of its defects. These assignments need no consideration; for, even if it be conceded that such damages were speculative and remote, no error prejudicial to the plaintiff would be presented by the record, since the court rejected the allowance made by the jury therefor, and his conduct in admitting evidence thereof, and permitting the jury to find thereon, can have had no effect on the judgment appealed from.

Equally unnecessary of consideration are the second, seventh, and ninth assignments of error, which raise the contention merely that the engine was conclusively shown by the pleadings to have been accepted by the defendant. This contention might be conceded without disclosing prejudicial error. The only damages of which recovery is allowed are those entirely consistent with the acceptance and retention of the machine. They are special damages resulting from defects therein which constituted a breach of the warranty that it should be in good working condition. Had defendant not accepted the engine, but elected to return the same by reason of the defects, his right of recovery would be all sums paid upon the purchase price therefor, together with such special damages as he might have suffered while fairly experimenting therewith and before discovery of the breach of the warranty; but such damages are neither demanded in the counterclaim nor allowed by the judgment. The purchaser, in the event of breach of warranty, has the election of two remedies, namely: first, to return the article purchased, recover back purchase price paid, and certain special damages; or he may retain the machine, and recover or recoup against the agreed purchase price such damages as its defective con-

dition imposes upon him without negligence on his part. *Fisk v. Tank*, 12 Wis. 276; *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 590, 606; *S. C.* 107 Wis. 9. The damages sought in this action and included in the judgment are all of that character. They are the wastage of time of himself and his threshing crew in the actual effort to use the machine, upon plaintiff's solicitation that he do so, and the value of his own time in reasonable efforts to remedy those defects, together with a small sum for the hire of another engine for a few days to accomplish the work for which, had this engine been as warranted, it would have served.

The most serious question presented is whether the special verdict is sufficient to support the judgment, which includes the value of defendant's time spent in thirteen trips to get engine repaired and in six days spent in trying to repair it. The value of such time is duly found by the verdict, and cannot be questioned. The fact that such time was in fact consumed is, however, not found by the verdict, although clearly the court must have decided or assumed that it was established by the evidence, and that, too, beyond controversy, since he did not submit it to the jury, but substantially stated it as a fact in the questions framed and submitted. Several rules have been declared as governing the attitude of this court towards judgments appealed from when the evidence is not all brought into the record by bill of exceptions certified to contain it. In such case it is said the only question is whether the pleadings and verdict or findings support the judgment. *Wille v. Bartz*, 88 Wis. 424, 428; *Hussa v. Sikorski*, 101 Wis. 131, 133. If they do not, it is said reversal must result. *Blossom v. Ferguson*, 13 Wis. 75; *Hildman v. Phillips*, 106 Wis. 611, 616. The last rule is modified to the extent that reversal is not necessary if the judgment is supported and warranted, in trials to the court, by the evidence, or, in trials to a jury, by the uncontroverted evidence. *Williamson v. Neeves*, 94 Wis. 656, 661; *Gatzow v. Buening*, 106 Wis. 1, 17. This exception grows

out of the now perfectly well-established rule that even in jury trials issues of fact need not be submitted to the jury if the evidence thereon is undisputed, all one way, and capable of supporting only one reasonable inference. On this principle rests the power of the court to render judgment of nonsuit or to direct a verdict. *Maanum v. Madison*, 104 Wis. 272; *Finkelston v. C., M. & St. P. R. Co.* 94 Wis. 270, 278; *Brauchle v. Nothhelfer*, 107 Wis. 457; *Musbach v. Wis. C. Co.* 108 Wis. 57. A bill of exceptions, duly certified to contain all the evidence, is obviously necessary to inform this court what was the evidence, so that we can examine and decide as to the correctness of the facts deduced therefrom on the trial; and any fact decided to exist by the tribunal, court or jury, having authority to decide, must be conclusively presumed to exist, in the absence of such bill of exceptions, for we then have no means of knowing the contrary, and must presume against error.

From the foregoing it necessarily follows that when the trial court, sitting with a jury, expressly decides an issue of fact, we must presume its decision was supported by uncontroverted evidence, if the evidence is not before us. *Edleman v. Kidd*, 65 Wis. 18, 23. We do not decide that the mere rendition of judgment upon a special verdict which fails to dispose of all the issues will be construed as a decision by the court of the omitted issues, for that question is not before us. In the case at bar the court clearly assumed as established without controversy, and so declares upon the record, that the defendant did make the thirteen trips, and did devote the six days' labor to remedying the defects against which plaintiff had warranted, so that the value of his time was a legitimate element of damages. We conclude, therefore, that the judgment is supported by the verdict and the facts found by the court as uncontroverted, and, no error appearing to have been committed, should be affirmed.

By the Court.—Judgment affirmed.

BUTTON and another, Respondents, vs. COLE and another, Executors, Appellants.

February 2 — February 26, 1901.

Replevin: Michigan statute: Death of plaintiff: Prosecution of suit by his sureties: Judgment binding on his estate.

Sec. 7414, How. Ann. Stats. Mich. 1882, provides that when the sole plaintiff in a replevin action shall die during the pendency of the suit it shall be sufficient for the defendant to notify the sureties in the replevin bond to appear and prosecute the suit, and if they fail so to do then their appearance may be entered by the defendant, and thereupon the cause shall be proceeded in to judgment and execution in like manner and with like effect as though the same had been originally commenced in the name of the sureties. *Held*, that in such a case the sureties represent the estate of the deceased plaintiff, and a judgment against them is binding upon it. The owners of such judgment are entitled, therefore, to have it allowed as a claim against such estate.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

This is an appeal from a judgment of the circuit court allowing a claim in favor of the respondents against the estate of one James H. Mead, deceased. James H. Mead died testate at the city of Sheboygan, September 22, 1891, and letters testamentary were duly issued to the appellants, who duly qualified as executors of said will. There was no dispute as to the facts of the case.

On the 17th of December, 1887, James H. Mead, deceased, commenced a replevin action in the circuit court for the county of Gogebic, in the state of Michigan, against Henry Ehrmantraut and Zellie Darrow, claiming to recover the possession of a quantity of personal property. A writ of replevin was issued and delivered to the sheriff, in said action, and the property seized and turned over to the said plaintiff, Mead, who took possession of the same, and con-

verted it to his own use. Before said property was turned over to Mead, a replevin bond was given to the sheriff under the statutes of Michigan, conditioned and signed as follows:

"The condition of this obligation is such that, if the above-bounden James H. Mead shall prosecute to effect a certain suit in replevin which he has commenced in the circuit court for the county of Gogebic against Zellie Darrow and Henry Ehrmantraut, defendants, for taking and unjustly detaining [here follows description of property], and if the said defendants shall recover judgment against him in said action, then, if he, the said James H. Mead, plaintiff, shall return the same property, if return thereof be adjudged, and shall pay to the defendant all such sums of money as may be recovered by such defendants against him in said action, then the above obligation to be void; otherwise to remain in full force and virtue. JAMES H. MEAD, [L. S.]

"by O. E. KARSTE, Agent.

"O. E. KARSTE, [L. S.]

"F. A. HEALY, [L. S.]."

The defendants, Ehmantraut and Darrow, joined issue in said action. On the 29th of January, 1890, the issue came to trial in said court, and judgment of nonsuit was rendered against Mead. The property was not returned by Mead, and before any judgment was entered for the value thereof, and on the 22d of September, 1891, Mead died, being a resident of Sheboygan county of this state, and his will was in due time probated, and the appellants qualified as executors thereof. The executors made no attempt to revive said action, whereupon the defendants, pursuant to sec. 7414, How. Ann. Stats. Mich., notified the sureties in the replevin bond to appear and prosecute said suit, and the said sureties did appear, and such proceedings were thereafter had that on the 11th of December, 1897, judgment was duly rendered in said court in favor of Ehrmantraut and Darrow and against said sureties for damages for the value of said property replevied, amounting to $799.93. Execution was thereafter issued upon said judgment against said sureties, and returned wholly unsatisfied. Prior to the filing of this

claim said judgment was, for valuable consideration, assigned and transferred to the plaintiffs, and said replevin bond was also duly assigned to the plaintiffs.

The executors made objections to said claim on the ground that it did not constitute a valid claim against the estate upon the merits, and further that the same was barred by the six-year statute of limitations, being sec. 8713, How. Ann. Stats. Mich., and sec. 4222, Stats. 1898. Certain sections of the statutes of Michigan relating to the action of replevin were offered in evidence on the trial, which sections, so far as deemed essential, are as follows:

"SECTION 8324. Sec. 10. Before the officer shall deliver such property to the plaintiff, such plaintiff, or some one in his behalf, shall execute a bond to such officer and his assigns, with the addition of his name of office, with sufficient sureties, to be approved by such officer, in a penalty not less than one hundred dollars, and at least double the appraised value of such property; conditioned that the plaintiff will prosecute the suit to effect, and that if the defendant recover judgment against him in the action, he will return the same property, if return thereof be adjudged, and will pay the defendant all such sums of money as may be recovered by such defendant against him in the said action."

"SECTION 8346. Sec. 33. If the property specified in the writ shall have been delivered to the plaintiff, and the defendant recover judgment by discontinuance or nonsuit, such judgment shall be, that the defendant have return of the goods and chattels replevied, unless he shall elect to waive such return as hereinafter provided; and also that he recover the damages sustained by him by reason of the detention of such goods and chattels, which damages shall be assessed by a jury in the proper court.

"SECTION 8347. Sec. 34 (Am. 1865, p. 325, Mar. 15, June 22, Act 195). Whenever the defendant shall be entitled to a return of the property replevied, instead of taking judgment for such return, as above provided, he may take judgment for the value of the property replevied, in which case such value shall be assessed on the trial, or upon the assessment of damages, as the case may be, subject to the provisions of section twenty nine of this chapter."

"SECTION 8352. Sec. 39. If any writ of return, or other execution, issued in favor of the defendant in the action, shall be returned unsatisfied in whole or in part, such defendant or his representatives may have an action upon the bond executed by or on behalf of the plaintiff, to recover against the obligors therein the value of the property replevied, and the moneys, damages and costs awarded to such defendant, and such bond shall be assigned to such defendant or his representatives, on their request.

"SECTION 8353. Sec. 40. In such action the plaintiff shall assign breaches of the condition of such bond, as in other cases; and the return of the sheriff to the execution issued in the action of replevin, shall be evidence of such breach; the amount recovered in such action of replevin, and remaining uncollected, shall be the measure of the damages, if the value of the property replevied shall have been so recovered, and if not so recovered, and a return thereof shall have been awarded, such value shall be added to the damages and costs recovered in the action of replevin, and the amount of such value, damages and costs, remaining uncollected, shall form the measure of damages."

"SECTION 7397. Sec. 5. In addition to the actions which survive by the common law, the following shall also survive, that is to say: actions of replevin and trover, actions for assault and battery, or false imprisonment, or for goods taken and carried away, and actions for damage done to real or personal estate."

"SECTION 7414. Sec. 22. In all actions of replevin, or in attachment, when the sole plaintiff shall die during the pendency of the suit, it shall be sufficient for the defendant or defendants, as the case may be, to notify the surety or sureties in the replevin or attachment bond, to appear and prosecute the suit, and if he or they shall fail so to do within such time as the court shall direct, then his or their appearance may be entered by the defendant or defendants, and thereupon the cause shall be proceeded in to judgment and execution, in like manner, and with like effect, as though the same had been originally commenced in the name of such surety or sureties."

Upon these facts the court rendered judgment against the estate of Mead for the amount of the replevin bond, with interest and costs, and the executors appeal.

For the appellants there were briefs by *Fish, Cary, Upham & Black*, and oral argument by *A. L. Cary*.

For the respondents there was a brief by *Timlin, Glicksman & Conway*, and oral argument by *Nathan Glicksman*.

WINSLOW, J. When Mead brought his action of replevin in the Michigan court he undoubtedly submitted himself to the provisions of the laws of Michigan governing such an action, and stipulated, in legal effect, that they should bind him and his personal representatives. If, by the terms of the law of Michigan, the judgment rendered in the action in question December 11, 1897, was binding and conclusive upon the question of Mead's rights in the property replevied, notwithstanding his previous death, then the plaintiff's claim here was properly allowed, irrespective of other questions discussed.

The statute of Michigan, at the time the replevin action was brought, and at the time the judgment therein was rendered, provided (How. Ann. Stats. 1882, sec. 7414):

"In all actions of replevin, . . when the sole plaintiff shall die during the pendency of the suit, it shall be sufficient for the defendant or defendants, as the case may be, to notify the surety or sureties in the replevin . . bond to appear and prosecute the suit, and if he or they shall fail so to do within such time as the court shall direct, then his or their appearance may be entered by the defendant or defendants, and thereupon the cause shall be proceeded in to judgment and execution, in like manner, and with like effect, as though the same had been originally commenced in the name of such surety or sureties."

We have no similar provision in this state, nor have we found or been referred to any decisions in Michigan throwing light upon its proper construction. We know of no legal reason, however, which would prevent the legislature from providing that a replevin action should proceed after death of the sole plaintiff, the plaintiff's rights being represented and protected by the sureties upon the bond, and the

judgment rendered becoming conclusive upon the rights of the original parties plaintiff as well as defendant. If such be the meaning of this section, then the claimants here must recover, because the provisions of this section were fully complied with. That such is its meaning we cannot doubt. It provides that sureties shall appear and prosecute *the suit*, and that *the cause* shall be proceeded in to judgment and execution. It is not another suit or cause which proceeds to judgment, but the suit or cause which the plaintiff commenced. Manifestly, it is the plaintiff's right to the property which is to be tried, not the sureties', for they have none. If the plaintiff's right be shown to be good, and a recovery had, it cannot be doubted but that the defendants will be bound by the result; and conversely it must follow that, if the defendants defeat the plaintiff's alleged right, the result must be equally binding on those now representing that right; otherwise, the trial would be merely the trial of a moot question, and the personal representatives of the deceased plaintiff could litigate the whole question over again at any time, whatever the result of the trial under sec. 7414.

The only clause in the section which throws doubt on this construction is the last clause, providing that the cause shall proceed to the end with like effect as though originally commenced in the name of the sureties. It seems very apparent that this language is at least inaccurate. The sureties have no title to the property in dispute, and do not claim to have any. Had the suit been commenced by them originally, they could never have recovered. They must prosecute it as representatives of and in the right of the deceased plaintiff if they prosecute at all. This is the only view which gives reason to the section, and we think this last clause must be construed as meaning that the suit is to proceed in the name of the sureties in like manner and with the same effect as if the sureties were in fact the original plaintiffs and possessed the plaintiff's rights.

So construing the Michigan statute, it is evident that the estate of Mead was represented in the replevin action by the sureties upon the bond, and that therefore the judgment against the sureties bound the estate; and the plaintiffs here, being the owners of that judgment, were entitled to have the claim allowed against the estate because the matter was *res adjudicata.*

By the Court.— Judgment affirmed.

O'CONNOR, Respondent, vs. CITY OF FOND DU LAC, Appellant.

February 2 — February 26, 1901.

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57 LRA 280n
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57 LRA 775n

(1-3) *Action: Conditions precedent to right to sue and to remedy: Limitations: Waiver.* (4, 5) *Statutes: When take effect: "From and after" publication.* (6-11) *Municipal officers: Election and term of office: Power of legislature: Constitutional law.*

1. Failure to perform a condition precedent to the existence of a right, as that prescribed by sec. 1339, Stats. 1898, prevents the acquirement thereof, and may be insisted upon at any stage of judicial proceedings in respect thereto.
2. Failure to perform a condition of the use of a judicial remedy to enforce a right having no dependence thereon for its existence — such as the condition requisite to the continued existence of a claim against a railway for the negligent killing of stock by a railway train, or damage for the negligent setting of fires by a locomotive engine, under sec. 1816*b*, Stats. 1898 — is waived if objection is not taken by answer or demurrer, the statute, to all intents and purposes, being a statute of limitations and governed as such.
3. Failure to perform a statutory condition precedent to the commencement of an action — as one that no action shall be commenced to enforce a city liability until notice shall have been given of the existence thereof and the common council of the city have had an opportunity to pass upon the same — has the same effect as failure to comply with a statute of limitations. It is in the nature of such a statute, though failure to comply with it may only abate the action if objection be taken by answer or demurrer. If not so taken the objection is waived.

4. The words "from and after," used in a statute in regard to time, are ordinarily held to signify exclusion of the day from which reckoning is to be made; and such meaning should prevail in the absence of some clear legislative intent to the contrary.
5. Publication of an act of the legislature prior to its taking effect being for the purpose of enabling persons affected to shape their course accordingly, a provision therefor in the form, the act shall take effect from and after publication thereof, is consistent with such words being used exclusively and inconsistent with their being otherwise used.
6. Ch. 247, Laws of 1897, which attempted to extend the term of office of the chief of police in the defendant city, among other such corporations, beyond the term for which he was specifically elected, if valid, entitled him to hold such place and receive the emoluments thereof till succeeded by a person appointed to his place under such act.
7. Sec. 9, art. XIII, of the constitution, prohibits the legislature from interfering in any way with the question of what person shall hold any office in any city in this state of a character known at the time of the adoption of the constitution, whether then known by the same name as subsequently or not, and limits all power in that regard to the electors of the particular locality interested, to be exercised directly or by some municipal agency selected directly or indirectly by them.
8. City governments, at the time of the adoption of the constitution, commonly included a police department, and all offices pertaining thereto, whether now known by the names they bore prior to such adoption or not, must be considered as in the class which the constitution expressly declares must be filled by election by the electors of the particular localities interested, or by appointment by such authority of such localities as the legislature shall designate.
9. The idea expressed in the constitution is not that all officers of towns, cities, and villages whose election is not provided for in the constitution may be elected or appointed in such manner as the legislature may deem best, but that all officers corresponding to town, city, and village officers as regards official duty, that were known at the time of the adoption of the constitution, shall be elected or appointed by some authority of the particular locality interested, designated by the legislature.
10. An act of the legislature appointing members of a police force in a city is an unconstitutional interference with local affairs.
11. An act of the legislature, so far as it expressly, or by its effect, extends the term of office of a member of the police force of a city

beyond that for which he was specifically elected or appointed by legitimate municipal authority, so as to keep such officer in place for any period of time regardless of such authority, is unconstitutional and void.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

Action to recover for services rendered defendant as chief of police. Plaintiff was elected such chief May 1, 1896, for the year ending May 1, 1897, and till his successor should be legally elected and qualified, the salary of the office being fixed at $50 per month, payable monthly. He qualified for the office and performed its duties till excluded therefrom as hereafter mentioned. April 17, 1897, an act of the legislature, known as chapter 247 of the General Laws of 1897, was duly published. It provided, among other things, as follows:

In cities of the third class, to which defendant belonged, a board of police and fire commissioners, consisting of four citizens, shall be appointed, in a manner indicated, before the first Monday of May, 1897, one to hold his office for the term of one year, one for two years, one for three years, and one for four years, from the said first Monday of May following, and until his successor should be appointed and qualified. No person shall be appointed to any position on the police force or in the fire department in any such city except with the approval of said board, after said act goes into effect. Said board shall, as soon as practicable, prepare and adopt rules and regulations governing the selection and appointment of persons to be employed on the police force and in the fire department of any such city. Whenever the term of office of any chief of police or chief engineer of a fire department heretofore appointed or elected in any such city shall expire after the act goes into effect, and before the board of police and fire commissioners shall have adopted

the necessary rules and regulations with reference to the appointment of police officers, or when any such officer is holding over at the time the act goes into effect, such officer shall hold his office until his successor shall have been duly appointed in accordance with the rules and regulations of the board. All other members of the police force in any such city, at the time the act goes into effect, shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter under certain specified conditions.

The act further provided for the suspension of police officers by the board of police commissioners under certain circumstances.

In defendant city, prior to May 1, 1897, a board of police commissioners was duly appointed, and the members thereof duly qualified, and on the first Monday of May, 1897, entered upon the duties of their offices. About May 24th, thereafter, said board, in compliance with said act, promulgated its rules for the appointment of members of the police department of the city and other employees and officers affected by said act. In April, 1897, the common council of the city appointed Thomas McGrath chief of police thereof for the year commencing May 1, 1897. He took the oath of office of such chief April 17, 1897, and filed such oath and his official bond with the clerk of said city. Such bond was not presented to or approved by the council of the city until April 22, 1897. On May 1, 1897, defendant caused plaintiff to be excluded from the office of chief of police upon the pretense that his term of office expired on that day and that said McGrath was entitled to enter upon the duties thereof. From the time of such exclusion until November 1st thereafter plaintiff held himself in readiness to perform the duties of chief of police of said city, and offered to perform such duties, but was not allowed to do so. At the end of each month during said period, plaintiff in due form of law made

his claim against the city for $50 as salary of chief of police of said city, all of which claims were rejected by the common council thereof. Plaintiff was never removed from his office by the said board of police commissioners, or displaced by any other person under its rules and regulations.

The pleadings raised merely the issue of whether the city of *Fond du Lac* was indebted to plaintiff for salary of chief of police for the six months subsequent to May 1, 1897. There was no dispute but that the facts were as above stated. The court found, as a matter of law, that plaintiff was chief of police of the defendant when the act of 1897 went into effect, and was entitled to hold said office till November 1st thereafter, since he was not removed or displaced by the board of police and fire commissioners; that his exclusion from the office was wrongful, and that he was entitled to recover the salary of the office claimed. Judgment was rendered accordingly.

For the appellant there was a brief by *O. H. Ecke*, city attorney, and *Maurice McKenna* and *Edward W. Phelps*, of counsel, and oral argument by *Mr. McKenna*. To the point that ch. 247, Laws of 1897, is invalid so far as it extends the term of office of the chief of police, they cited sec. 9, art. XIII, Const.; *Cole v. Black River Falls*, 57 Wis. 110; *State ex rel. Hamilton v. Krez*, 88 Wis. 135; *People ex rel. Lord v. Crooks*, 53 N. Y. 648; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374, 383; *People ex rel. Fowler v. Bull*, 46 N. Y. 57, 61–63; *State ex rel. Perry v. Arrington*, 18 Nev. 421, 424; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355; *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614.

Edward S. Bragg, of counsel, for the respondent.

MARSHALL, J. Sec. 5 of subch. XVIII of the city charter of the appellant provides as follows:

"No action shall lie or be maintained against the city of *Fond du Lac* on contract until the claimant shall have presented to the common council, a statement of the claim and

the amount thereof, and the circumstances out of which it arose, duly verified on the oath of the claimant, and the council shall have allowed a regular meeting to pass without an adjustment with the claimant of such claim or demand." Laws of 1883, ch. 152.

The complaint does not show that such charter condition to the maintenance of this action exists. No objection was taken by appellant on that ground, either by answer or demurrer. The record does not show that evidence of the existence of such condition was produced. The point is now made that such situation is fatal to the judgment, the following cases being cited in support thereof: *Stocks v. Sheboygan*, 42 Wis. 315; *Hill v. Fond du Lac*, 56 Wis. 244; *Kelley v. Madison*, 43 Wis. 638; *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226. *Stocks v. Sheboygan* is unlike this case, because there the question of the existence of the condition was raised by demurrer. In *Hill v. Fond du Lac*, the question here raised was not involved, because the action sounded in tort and was held not to be included in the charter provision. *Kelley v. Madison* is unlike this case for two reasons: first, because the question was raised by a demurrer to the complaint; second, because it was held that the action was one sounding in tort and not affected by the charter provision against the maintenance of an action on a claim or demand till the same should be first filed as therein required. In *Weed & G. Mfg. Co. v. Whitcomb*, a statutory condition to the enforcement of a common-law right was treated as a condition of the right itself, confusing a limitation statute acting on the remedy only, which may be and is waived by a failure to insist upon it by answer or demurrer (sec. 2654, Stats. 1898), with a statutory condition to the existence of a right, as, for instance, one necessary to a cause of action against a municipality for compensation for an injury caused by a defective highway under sec. 1339. The same error was committed in *Ryan v. C. & N. W. R. Co.* 101 Wis. 506. It was corrected, as far as pos-

sible, in *Relyea v. Tomahawk P. & P. Co.* 102 Wis. 301, which was affirmed in *Meisenheimer v. Kellogg*, 106 Wis. 30, and *Malloy v. C. & N. W. R. Co.*, *ante*, p. 29.

So we see that none of the cases cited by counsel supports their proposition, while *Relyea v. Tomahawk P. & P. Co.*, and *Meisenheimer v. Kellogg*, are to the effect that charter provisions of the kind under consideration are in the nature of statutes of limitations and governed by rules applicable thereto. If not complied with, the objection must be taken by answer or demurrer or be considered waived. Care must be taken not to confuse such statutes with those imposing a condition of the existence of a right. Noncompliance with the latter condition goes to the cause of action, not to the remedy for the redress of the wrong. The distinction between the two classes of rights is so clear that no one need go astray. In one case the right depends on the statute; in the other the right is independent of the statute, but its enforcement is regulated and limited by law. In the former, failure to comply with the statute prevents the creation of the right, hence it is not waived by failure to raise the point by demurrer or answer; while in the latter the condition relates to the remedy only, and is waived unless insisted upon by answer or demurrer. That was the rule at common law, and the statute (sec. 2654, Stats. 1898) expressly preserves it. Failure to comply with a statutory condition of the use of a remedy does not go either to the jurisdiction of the court or to the cause of action.

The foregoing is in harmony with *Sheel v. Appleton*, 49 Wis. 125, and *Benton v. Milwaukee*, 50 Wis. 368. In *Benware v. Pine Valley*, 53 Wis. 527, the court said that failure to comply with the condition of sec. 1339, as regards a claim for damages caused by a defective highway, and to allege such compliance in the complaint, was fatal to plaintiff's cause of action, though the point be not raised by answer or demurrer; and that anything said to the contrary in the

other two cases above referred to is wrong. The idea seems to have been in mind that the cases were somewhat in conflict. In that the court fell into the error of not observing clearly the distinction between compliance with a statute which is the foundation of a right, and compliance with one which merely regulates or limits the enforcement thereof. The *Benware Case* was decided rightly, because service of the notice of the injury under sec. 1339, R. S. 1878, was a condition of the right there in question. The other two cases were also decided rightly, because the statutory condition involved operated only upon the remedy. Those cases were affirmed in *Bradley v. Eau Claire*, 56 Wis. 168; *Collette v. Weed*, 68 Wis. 428; *Lombard v. McMillan*, 95 Wis. 627; and *Bigelow v. Washburn*, 98 Wis. 553.

The case, on the merits, turns on the effect of ch. 247, Laws of 1897, on respondent's right to hold the office of chief of police of the appellant, from the 1st day of May, 1897, till the 1st day of November thereafter. On that, these questions are presented for solution: When did the act take effect? Was McGrath the legal successor of respondent by the terms of the act and entitled to the office in dispute from the 1st day of May, 1897, at least till displaced by an appointee of the board of police and fire commissioners? If not, and the law by its terms took from appellant the power to elect a successor of respondent, or extended his term of office beyond the 1st day of May, 1897, was it in that regard constitutional? We will consider each of such propositions, though it pretty clearly appears that the first is immaterial.

1. Appellant contends that the act in question became a law on the 18th day of April, it having been regularly published on the previous day; that the day of publication should be excluded in determining when the law became effective. That turns on the meaning of the words "from and after" in the last section, which says: "This act shall

take effect and be in force from and after its passage and publication." The word "from," and that in connection with the word "after," is sometimes used inclusively and sometimes exclusively. They have no certain literal or legal meaning that can be accepted as a guide under all circumstances. They are open to construction in many cases, so that courts sometimes hold that they are used exclusively, and at other times inclusively, as seems best calculated to effect the legislative intent; though it has come to be quite generally accepted as the rule that the meaning of the words in connection, "from and after," excludes the day from which the reckoning is to be made, and in order to avoid the application of it as a rule of construction there must be something in the act, or the result of a literal application of the words to the subject treated by it, to indicate a contrary intent. Sedgwick, Stat. & Const. Law, 356; Smith, Stat. & Const. Law, § 616. That has been recognized as the law by this court. *Stewart v. McSweeney*, 14 Wis. 468; *McGinley v. Laycock*, 94 Wis. 205. There is no reason why "from and after," in the act in question, should not be considered as having been used in what we say has come to be regarded as their literal sense. On the contrary the purpose of the publication strongly supports that view. That purpose was to give notice, to persons affected by the law, of its existence, before it went into effect. Clearly, such purpose could not be accomplished without a completed publication. That would exclude the day on which the act was done, as fractions of a day are not ordinarily counted. The contrary view would lead to the absurd result that an act designed to give notice of the existence of a law in advance of its going into effect might occur subsequent thereto. It cannot be held that any such absurdity was intended, by mere judicial construction. The other view accords with the literal sense of the words. It gives significance to the use of the word "after" in connection with the word

"from," and makes the meaning sensible in the light of the purpose of the publication. That idea has been adopted elsewhere. *Duncan v. Cobb*, 32 Minn. 460; *Parkinson v. Brandenburg*, 35 Minn. 294.

2. There is no controversy but that McGrath was regularly elected as respondent's successor by the common council of appellant before the act in question went into effect. The learned trial court does not appear to have regarded the date of such election as of sufficient significance to require a mention thereof in the findings of fact, but he gave prominence to the date of the circumstance of qualification by the approval of the official bond. The latter circumstance does not appear to have been made material by the law of 1897, in any view of it. If the act was valid it took from the common council power to elect a chief of police after the 17th day of April, 1897, not before. Election to an office is one thing; a condition precedent to the person elected taking possession thereof is quite another thing. It was with the first circumstance that the law dealt, and that is the significant one on this branch of the case. Those provisions of the law affecting McGrath's right to the office are in the main as follows:

"After this act goes into effect no person shall be appointed to any position, either on the police force or in the fire department, . . . except with the approval of the board."

"Whenever the term of office of any chief of police . . . or other officer performing the duties of chief of police . . . by whatever name designated, heretofore appointed or elected, . . . shall expire after this act goes into effect and before the board of police and fire commissioners shall have adopted the necessary rules and regulations with reference to the appointment of police officers and members of the fire department, . . . or when any such officer is holding over at the time this act goes into effect," he shall hold his office "until his successor shall have been duly appointed by the board."

"All other members of the force in either department named, . . . at the time this act goes into effect, shall hold their respective positions for six months from the date when the rules and regulations adopted by the board shall go into effect, and thereafter," under certain conditions mentioned.

It seems quite clear that the legislative idea was that the persons elected to official positions affected by the act, before it took effect, whose terms of office should expire there after and before the board of police and fire commissioners should be competent to fill their places, should remain in such places till that time, regardless of the specific terms for which such officers were elected or appointed. It says distinctly, as to the particular office in question, if the term of an officer elected or appointed before the taking effect of the act shall expire thereafter, he shall nevertheless continue in office till the place shall be filled by the board according to rules and regulations to be adopted by it as soon as possible after the first Monday of May, 1897. That contemplated, as to such office, these circumstances in combination: a person elected or appointed prior to the taking effect of the act, the expiration of the term for which he was elected or appointed prior to the creation of the board of police and fire commissioners, and its qualification to act pursuant to the rules and regulations adopted for its government. We should say in passing that the making of such rules was not contemplated till after the 1st day of May, 1897, and that the terms of office of the members of the board did not commence till that time. The respondent satisfies the conditions mentioned, and McGrath does not. The latter was elected before the act in question went into effect, but the term for which he was elected did not expire prior to the time when the board of police and fire commissioners were required to be in readiness to fill the place by appointment under its rules and regulations. It follows that the second proposition advanced by appellant

must be resolved in favor of respondent. By the wording of the law his term of office was extended beyond that for which he was elected, and since his place was not sooner filled by the board of police and fire commissioners, such extension included the six months from May 1 to November 1, 1897. He was therefore entitled to recover of appellant the salary for which this action was brought, if the legislative extension of his term of office was valid.

3. The validity of the legislation extending the term of office of respondent, regardless of the will of the appellant, must be tested by sec. 9, art. XIII, of the constitution, which provides that:

"All city, town and village officers whose election or appointment is not provided for by this constitution shall be elected by the electors of such cities, towns and villages, or of some subdivision thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct."

Counsel for both sides seem to appreciate fully that such constitutional provision was adopted here from New York, it having existed there as early as 1846; that it was construed by the highest courts of that state at an early day, and that such construction has been approved here so far as the subject has been presented to this court; but they draw very different conclusions from the decisions.

It will be observed that the language of the constitution deals with several classes of officers: first, city, town and village officers whose election or appointment is provided for by the constitution; second, such officers not provided for by the constitution; third, all other officers whose election or appointment is not provided for by the constitution; fourth, all officers whose offices were created by law subsequent to the adoption of the constitution. It was absolutely

taken out of the power of the legislature to appoint any officer of the second class mentioned, such power being expressly conferred upon the people of the municipality served by such officers. The purpose of that is plain and has often been declared by the courts. It was to render secure the important right of local self-government,— to give to the people of each locality the power to say and determine as directly as practicable who shall perform the governmental functions that concern such localities only as organized subdivisions of the state. That right, under our system of government, has from the start been regarded as the very foundation thereof, and absolutely necessary to its success. The New York court, in a very recent case, expressed the idea indicated, thus:

"As to offices known and in existence at the time of the adoption of the constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by any body other than the local electors or some local authority designated by law. This right of self-government lies at the very foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or invasion of it is to be promptly met and condemned by the courts when such acts become the subject of judicial investigation." *Rathbone v. Wirth*, 150 N. Y. 459, 469.

That language is none too strong. It voices correctly the views of the framers of the constitution as they were unmistakably written into it. Therefore, if it appear that the office in question in this case was one of the class the legislature was rendered powerless to fill, and that the law, so called, extending appellant's term was in effect an appointment thereto, the duty of the court to condemn the usurpation of power is plain.

We shall not take time to analyze at length the constitutional provision under consideration, because the questions in regard to it are too well settled to require or justify such labor. The class of officers which the legislature is prohibited from directly interfering with, includes, as indicated, all city, town, and village officers known and in existence at the time of the adoption of the constitution, whether known by the same names as they now bear or not. All of the New York authorities on the subject so hold. *People ex rel. Wood v. Draper*, 15 N. Y. 532; *People ex rel. Loew v. Batchelor*, 22 N. Y. 128; *People ex rel. Brown v. Woodruff*, 32 N. Y. 355; *People ex rel. Fowler v. Bull*, 46 N. Y. 57; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. Le Roy v. Foley*, 148 N. Y. 677; *Rathbone v. Wirth*, *supra*. This court has likewise passed upon the same question. *State ex rel. Hamilton v. Krez*, 88 Wis. 135.

The learned counsel for respondent argues that an office is a mere legislative creation, belongs to the fourth class mentioned in sec. 9, and may be filled by legislative appointment where there is no express constitutional provision for otherwise filling it. That overlooks the fact that power is not left with the legislature in its discretion to appoint or elect all officers whose election or appointment is not provided for in the constitution, and that it has never been so understood from the earliest treatment of the subject by Mr. Justice DENIO in *People ex rel. Wood v. Draper*, *supra*. From the fact that provision is not made in the constitution for the appointment of an officer to serve a town, city, or village in the performance of some duty as regards local government therein, it by no means follows, as suggested, that such appointment or election can be made directly by the legislature. The language of the constitution clearly indicates the contrary. Town, city, and village officers whose election or appointment is provided for in the consti-

tution are mentioned as a class only to exclude them from officers generally that have to do with the government of such local governmental subdivisions of the state. After making such exclusion, the balance of such local officers is put in the class to be selected only by the electors of the particular localities affected, by the direct vote of such electors or by some local agency designated by the legislature for that purpose. The idea, as we understand the counsel, that all officers whose election or appointment is not provided for in the constitution may be elected or appointed by the legislature, is as novel as it is contrary to the plain meaning of the constitution. If adopted, one of the fundamental ideas of the framers of that instrument would certainly be lost sight of. They intended that all local officers, according to the then known schemes for local self-government, should be chosen by the people of the localities affected. That such was the idea intended to be embodied in the constitution is voiced by every court that has spoken on the subject.

'The presence of the provision in the constitution in regard to the election or appointment of local officers by the people, evidences the importance which the people, when the constitution was framed, attached to the preservation of their right to the management of their local affairs. It means the right to choose their local officers in all its reality, or it means nothing. If it does not mean that the people have reserved the right of administering local offices by officers of their own choosing, whether it be done directly through an election or indirectly through the method of an appointment by some of their local authorities, I am at a loss to understand its significance or in what consists its peculiar value.' Justice GRAY in *Rathbone v. Wirth*, 150 N. Y. 459.

'The obvious purpose of that provision of the constitution was to secure to the people of the cities, towns and villages of the state, the right to have their local offices administered by officers selected by themselves.' ANDREWS, J., in *People ex rel. Williamson v. McKinney*, 52 N. Y. 374.

"Faithfully observed, and effect given to such provision in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus granted to all." ALLEN, J., in *People ex rel. Bolton v. Albertson*, 55 N. Y. 50.

The offices of policeman and chief of police or city marshal (the particular name of the office being immaterial) in cities and villages, were as well known at the time of the adoption of the constitution as any other. Such offices were understood to be essential to good order in large communities, and they were universally provided for in all city and village organizations. So there can be no question but that the power of electing or appointing such officers was prohibited to the legislature by the provision of the constitution under consideration.

But it is said that the mere continuance in office by legislative enactment, of a person whose installation in the position was by a constitutional agency is not a legislative appointment, and that the term of office of respondent, regardless of the law of 1897, having commenced by a municipal appointment and being for one year and until his successor should be elected and qualified, strictly speaking and in a constitutional sense, it was not extended by such law. That proposition was advanced in *People ex rel. Loew v. Batchelor*, 22 N. Y. 128, and was there adopted, but the case was soon overruled and has not been considered authority for nearly half a century. The rule in New York is the same as that declared in *State ex rel. Hamilton v. Krez*, 88 Wis. 135, that the continuance of a person in office by legislative interference, beyond the specific term for which he was elected or appointed, is equivalent to a new appointment to the office, and void if the office be one that the legislature cannot fill by direct appointment or election. *People ex rel. Fowler v. Bull*, 46 N. Y. 57; *People ex rel. William-*

son v. McKinney, 52 N. Y. 374; *People ex rel. Le Roy v. Foley*, 148 N. Y. 677. The right to fill an office by a new selection at the expiration of each term thereof is secured to the people of the locality specially concerned, the same as the power to fill the place in the first instance, and any attempt to interfere with that right, working a continuance of an incumbent in office, under the general rule that his incumbency shall continue till a successor is elected and qualified, is held to be as much a legislative appointment and usurpation of power as an express appointment to the place. In *People ex rel. Le Roy v. Foley*, *supra*, it was said that the power to appoint in such cases cannot be directly exercised by the legislature, nor indirectly by extending the term of an officer after his election. It is clear, it would seem, that if an officer be kept in office by legislative interference for any period after he could, but for such interference, be displaced by the power that originally selected him for the place, it is to all intents and purposes one of the very legislative intermeddlings with local affairs that the constitution was designed to prevent.

It follows that it is the duty of the court to declare the act in question, so far as the effect thereof would otherwise be to extend the term of office of any officer mentioned in it, either expressly or by taking from cities the power to elect and install his successor, an excess of legislative authority and void.

Before leaving the subject we should refer to *State v. Douglas*, 26 Wis. 428, which the learned counsel for respondent contends supports the power of the legislature to do the thing called in question in this case. That case affirms the power of the legislature to shorten the term of an office not fixed by the constitution. That is quite a different question from the one considered here. It is one thing to elect or appoint a person to an office, or to extend the term of one already elected or appointed; that is what sec. 9, art.

XIII, in the cases covered by it, prohibits. It is quite another thing to shorten a term of office, leaving the power of the people of the locality affected unimpaired to fill the place anew, if it is to be filled at all. There is no constitutional restriction upon legislative power as to that, where the term of office is not fixed by the constitution.

Some other questions are suggested by appellant's counsel for consideration, but they do not appear to possess sufficient merit to call for special notice. The attempted extension of respondent's term of office was invalid. McGrath was entitled to take possession of the office at the time he did. The term of office of the respondent then expired.

By the Court.—The judgment is reversed, and the cause remanded with directions to render judgment in favor of the defendant for costs.

ALLEN, Respondent, vs. CITY OF FOND DU LAC, Appellant.
COMMO, Respondent, vs. CITY OF FOND DU LAC, Appellant.
HINMAN, Respondent, vs. CITY OF FOND DU LAC, Appellant.
SCHROEDER, Respondent, vs. CITY OF FOND DU LAC, Appellant.
TRELEVAN, Respondent, vs. CITY OF FOND DU LAC, Appellant.

February 2—February 26, 1901.

O'Connor v. Fond du Lac, ante, p. 253, followed.

APPEALS from judgments of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

For the appellant there were briefs by *O. H. Ecke*, city attorney, and *Maurice McKenna* and *Edward W. Phelps*, of counsel, and oral argument by *Mr. McKenna.*

Edward S. Bragg, of counsel, for the respondents.

MARSHALL, J. In each of the above cases the same error was committed as in *O'Connor v. Fond du Lac, ante,* p. 253.

Consequently the judgments must be reversed and the causes remanded with a direction as to each the same as in the *O'Connor Case.*

By the Court.—The judgment on each of the appeals is reversed, and the cause in which each such judgment was entered is remanded with directions to dismiss the complaint and enter a judgment in favor of defendant for costs.

MCKENNA, Respondent, vs. VAN BLARCOM, Administrator, and another, imp., Appellants.

February 2—February 26, 1901.

Judgments: Docketing: Priority of liens: Tacking: Attorneys at law: Purchase of mortgage.

1. Under secs. 2899, 2902, R. S. 1878, if a judgment against the mortgagor did not appear upon the judgment docket at the time a mortgage was executed and recorded, the lien of the mortgage was prior to that of such judgment, even though the latter had been filed in the office of the clerk and some entries relating to it had been made in the court records.
2. After the expiration of the lien of a judgment the judgment creditor cannot, by obtaining and docketing a new judgment, tack the two and thus make a continuous lien having priority over other liens existing at the time of such expiration.
3. An attorney at law is not, merely by reason of his position as an officer of the court, precluded from purchasing a mortgage with the intention of foreclosing it.

APPEAL from a judgment of the circuit court for Fond du Lac county: MICHAEL KIRWAN, Circuit Judge. *Affirmed.*

Action to foreclose a mortgage executed by James H. Gibson to J. S. Rowell, Sons & Co., dated December 31, 1878, and which was assigned to plaintiff. Gibson is dead, and this action is brought against his heirs and administra-

tor, and also the *Johnston Harvester Company*, alleged to be a subsequent lienor. The chief controversy arises over the answers of the administrator and last-named defendant. After sundry denials their answers, by way of counterclaim, alleged that the mortgage in question was executed by Gibson for the purpose of defrauding his creditors, and especially the defendant *Johnston Harvester Company;* that said last-named defendant obtained a judgment in the county court of Fond du Lac county against Gibson on October 19, 1878; and that said mortgagee took said mortgage with knowledge of said judgment, and in accordance with a conspiracy to defeat said claim. It was also alleged that said mortgage was given to settle a criminal prosecution and to compound a felony; that plaintiff, who is an attorney, was the counsel for the heirs of Gibson, for the purpose of compromising said *Johnston Harvester Company* judgment, and, failing to do so, purchased said mortgage many years after due, with full knowledge of its rights, and for the purpose of cheating and defrauding said defendant of its just claim. Other facts were alleged, which will be noticed in the opinion.

The court found the issue wholly in favor of the plaintiff, and directed a judgment of foreclosure and sale. The contesting defendants have taken this appeal from said judgment.

For the appellants there was a brief by *Duffy & McCrory*, and oral argument by *J. H. McCrory*.

Edward S. Bragg, of counsel, for the respondent.

Bardeen, J. It developed from the evidence offered by the defendants that the *Johnston Harvester Company* obtained a judgment against the mortgagor, Gibson, in the county court of Fond du Lac county, on the 19th day of October, 1878. This judgment was not docketed in the office of the clerk of the circuit court until the 21st day of

February, 1879. In the meantime, and on December 31, 1878, Gibson executed the mortgage in suit to secure a *bona fide* debt to J. S. Rowell, Sons & Co. It also appears from the evidence that the county court judgment was filed in the office of the clerk of the circuit court, and some entries were made in the court records relating to the same, on October 19, 1878, but it was not docketed as the statute requires until the date above mentioned. It is argued by defendants that, if the mortgagee had made search of the records in the clerk's office, its representatives would have found the defendant's judgment; and if they knew of its rendition, or could have discovered it by diligent inquiry, the omission of the clerk to docket it will afford them no protection against the lien thereof subsequently perfected. Such is not the law. Secs. 2899, 2902, R. S. 1878, provide for the docketing of judgments in a book especially prepared for that purpose, and that when so docketed they shall be liens upon the real property of the defendant "for a period expiring ten years from the date of the rendition thereof." No statute requires a party seeking for judgment liens to examine all the records in the clerk's office, and no principle of law of which we are aware imposes any such diligence. If the judgment docket shows a clear record, the party need seek no farther. When the mortgage in suit was executed and recorded the judgment docket failed to disclose that the *Johnston Harvester Company* had a lien upon the property covered by it. Such being the fact, the mortgage became the first lien, and must prevail over the lien sought to be set up by the defendants.

But, should the law be conceded to be as claimed by defendants, there is another reason why the lien of defendants' judgment must be postponed to that of the mortgage. The judgment was rendered on October 19, 1878. By sec. 2902, the lien thereof expired ten years from the date of rendition, or October 19, 1888. The fact that the judgment

creditor, after the expiration of such lien, sued upon said judgment and obtained a new one, which was afterwards docketed, does not allow him to tack the two and thus make a continuous lien. There was a period of several months between the expiration of the old lien and the inception of the new one, during which any other lien upon the property would attach and become superior to the lien of the new judgment afterwards acquired.

It is further urged that, as plaintiff is an attorney, he could not purchase the mortgage in suit and enforce it, and that he did not purchase in good faith and in the usual course of trade. Upon the question of good faith the evidence is all one way, and amply supports the trial court's conclusions in favor of plaintiff. The fact that George Gibson, one of the defendants, acted as plaintiff's agent in the purchase of the mortgage, is of no consequence. The reason he was sent to the mortgagee to open negotiations was that it was believed that he could obtain better terms than the plaintiff could. The plaintiff testified that he purchased the mortgage as a matter of business, and paid for it with his own money, without any understanding with others, and frankly stated that he intended to foreclose it if not paid. The assertion that he was disqualified from making such purchase because he was an attorney finds no support in the law of this state. It is only where questions of champerty or maintenance arise that such disqualification exists. *Miles v. Mut. R. F. L. Asso.* 108 Wis. 421. The only authority cited to support the defendants' contention is from New York, where they have an express statute on the subject. See *Browning v. Marvin*, 100 N. Y. 144. The disability of the attorney arises where some duty or obligation to his client is involved, and the courts are strict in enforcing a rigid adherence to such duty and a complete recognition of such obligations. The facts in this case fail to disclose any violation of duty or any such transaction as would bring it within the condemnation of the law.

By the Court.—The judgment is affirmed.

BROWN, Appellant, vs. GRISWOLD and wife, Respondents.

February 4 — February 26, 1901.

Agency: Sale of land: Oral authority to make written contract: Appeal: Defective findings: Directing judgment: Specific performance: Form of judgment.

1. Oral authority is sufficient to empower an agent to make a written contract for the sale of land.
2. In an action to enforce specific performance of a written contract for the sale of land, made by an agent who had only oral authority, the only disputed question of fact was whether the agent had been given authority to sell or only to find a customer. The first seventeen findings of the court were mere recitals of the testimony and correspondence of the defendant and the agent. The eighteenth finding was that the agent had not been authorized by defendant to execute the contract sought to be enforced. A question largely debated before the trial court was whether oral authority could suffice to empower the agent to make a written contract for the sale of land. The evidence preponderated in favor of the view that the agent had been given authority to sell. *Held*, that said eighteenth finding, being ambiguous, would be construed merely as a conclusion that oral authority to sell land was not authority to execute a binding contract for its sale, and not as a finding that the agent had not been given authority to sell.
3. In an action tried by the court, where there is no finding upon the only controverted question of fact, but there is no doubt where the true preponderance of the evidence is, and no gain can reasonably be expected from another trial, the supreme court, on reversing the judgment, will direct the entry of such judgment as the trial court should have rendered upon the evidence.
4. After the commencement of an action to compel specific performance of a contract for the sale of land, the defendants disabled themselves from making an effective conveyance by conveying the land to a purchaser upon whom the notice of *lis pendens* had been served. *Held*, that a decree in plaintiff's favor should be such that of its own force it will transfer to him all of the title which the defendants had at the time of the commencement of the suit, whether now vested in them or in some person claiming under them subsequent to that date.

109	275
110	*128
110	*285
109	275
113	*279
109	275
114	367
109	275
116	*443
109	275
117	*511

APPEAL from a judgment of the circuit court for Grant county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

The defendant, being the owner of a tract of real estate in the city of Platteville, fronting north on Main street about 210 feet, and extending southward about 360 feet, through the block to another street, made a verbal arrangement with Thomas L. Cleary, a lawyer, either to make sale thereof or to find customers therefor. After several years, characterized by much correspondence, and during which the south half of the premises had been sold by said Cleary, the latter, on June 2, 1896, closed a sale of the remainder to *Brown* at the price of $3,500, payable upon delivery of the deed, and gave to him an acknowledgment of payment of $100 thereof, reciting the terms of the agreement of sale, and signed the same, "*O. F. Griswold*, by T. L. Cleary, Agent." Defendant repudiated the sale, and on the day after this suit was commenced and *lis pendens* filed conveyed the premises by warranty deed to one McCoy, on whom had been served a copy of the notice of *lis pendens* the day before the filing of complaint and *lis pendens*. This action being brought to require specific performance, and being tried by the court, judgment was rendered dismissing the complaint, from which the plaintiff appeals. Further detail of facts will appear in the opinion.

For the appellant there was a brief by *Orton & Osborn*, and oral argument by *C. F. Osborn*. As to the power of agents to make contracts for the sale of real estate of their principal, they cited *Lyon v. Pollock*, 99 U. S. 668; *Johnson v. Dodge*, 17 Ill. 433; *Peabody v. Hoard*, 46 Ill. 242; *Cossitt v. Hobbs*, 56 Ill. 231; *Proudfit v. Wightman*, 78 Ill. 553; *Hemstreet v. Burdick*, 90 Ill. 444; Rapalje, Real Estate Brokers, 49; Fitch, Real Estate Agency, 34, 35; *Vandana's Heirs v. Hopkins' Adm'r*, 19 Am. Dec. 92; *Smith v. Allen*, 86 Mo. 178; *Glass v. Rowe*, 103 Mo. 535; *Minor v. Willoughby*, 3 Minn. 225; *Groff v. Ramsey*, 19 Minn. 44; *Jackson v. Badger*, 35 Minn. 52; *Holden v. Starks*, 159 Mass. 503; *Stadleman v. Fitzgerald*, 14 Neb. 290; *Hopwood v. Corbin*, 63 Iowa, 218;

Pringle v. Spaulding, 53 Barb. 17; *Haydock v. Stow*, 40 N. Y. 363, and cases cited; *Davidson v. Van Pelt*, 15 Wis. 342; *Taft v. Kessel*, 16 Wis. 274; *Davis v. Henderson*, 17 Wis. 106; *Seaman v. Ascherman*, 57 Wis. 555; Pomeroy, Contracts, 115, 116, and note; Story, Agency (9th ed.), § 50; 1 Am. & Eng. Ency. of Law (2d ed.), 1012; 1 Warvelle, Vendors, 211, and note.

For the respondents there was a brief by *Lowry & Clementson*, and oral argument by *George B. Clementson*. To the proposition that a general authority to sell real estate includes merely the power to find a purchaser, and that the agent cannot conclude a contract that will be binding upon his principal, they cited *Grant v. Ade*, 85 Cal. 418, 20 Am. St. Rep. 237; *Prentiss v. Nelson*, 69 Minn. 496; *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617; *Walker v. Osgood*, 93 Am. Dec. 172, note; *Treat v. De Celis*, 41 Cal. 202; *Armstrong v. Lowe*, 76 Cal. 616.

DODGE, J. There is but one debatable question in this case, and that is whether the defendant *Griswold's* arrangement with T. L. Cleary was merely an authority to seek and produce customers for the defendant's property, or whether, as between themselves, it was contemplated and agreed that Mr. Cleary was to sell the property at prices named and bind *Mr. Griswold* to such sale. This depends upon what was the conversation which the parties confessedly had at about the time the defendant left Platteville, in 1892, as to which different versions are given by Mr. Cleary and by the defendant in their testimony. This conversation, in which the agreement, whatever it was, was made, was followed by several years of correspondence and other transactions, all referring back to that original arrangement, and they are relevant and material merely as declarations and conduct evidentiary, and by way of practical construction, of the agreement into which Cleary and *Griswold* had already en-

tered. This being the issue, a direct and unambiguous finding of the trial court thereon would be of very much weight, and, unless the preponderance of evidence to the contrary of such finding was entirely clear, we should deem ourselves controlled thereby. On turning to the so-called findings, we find a document which it is confidently believed is without precedent. It consists of some thirteen printed pages, reciting a large share, but not all, of the evidence in detail. It finds that *Mr. Griswold* gave in testimony certain quoted words, and wrote certain quoted letters, and the same as to Cleary and as to the plaintiff. Indeed, the first seventeen of the so-called findings of fact are but little more than a repetition of information which ordinarily is derived, and in this case could have been derived, from the bill of exceptions, at least so far as the findings have any reference to the single disputed issue. The so-called findings of fact conclude with the eighteenth: "I further find that Mr. Cleary had not been authorized by *Mr. Griswold* to execute the contract of June 2, 1896, set forth in finding 10, and that the latter did not ratify said contract, but refused to do so." Then follows the single conclusion of law that the plaintiff is not entitled to the relief demanded and defendants are entitled to have the complaint dismissed upon the merits.

This eighteenth finding is ambiguous. It does not declare the conclusion of the trial judge either way upon the real litigated issue, namely, whether *Griswold's* authority to Cleary was to close sales and commit him to them, or was only to present customers for his acceptance or rejection. The natural construction of the words used in the eighteenth finding would indicate no more than a decision either of the question of fact whether *Griswold* expressly authorized Cleary to execute the specific written contract, or a question of law whether authority so to do resulted from the transactions between them. It was stated upon the argument, without dissent, that a question largely debated before the trial

court was whether oral authority could suffice to empower an agent to make a written contract for the sale of lands. That question was not discussed by the respondent in this court, and the law thereon in this state in favor of such power seems to be well settled in *Dodge v. Hopkins*, 14 Wis. 630; *Smith v. Armstrong*, 24 Wis. 446; and *Tufts v. Brace*, 103 Wis. 341, 344. In this situation we are left in much doubt whether the record discloses any conclusion of fact by the trial court upon the material issue, or merely upon one which the court believed to be material, but which, under the authorities, is not so. A careful examination of all the evidence leaves no doubt that, as an original proposition, it preponderates in favor of Mr. Cleary's version of the contract, as will appear by a fuller discussion thereof hereafter; and, while we are not prepared to declare that its preponderance is so clear and overwhelming that we would set aside an unambiguous finding of the trial court to the contrary, the fact that it does preponderate against this eighteenth finding, if it be construed as respondent would have it, is a very cogent one in guiding us to a conclusion as to the meaning of that finding. We should be slow to believe that the court meant to decide that the parties did not have an intention which their conduct and correspondence have so clearly evinced. Again, if the court intended by this last finding to decide what were the terms of the agreement or arrangement between Cleary and *Griswold*, we are unable to conceive any purpose to be accomplished by devoting many pages to setting forth the words of their testimony and correspondence. Such instrument strongly suggests confirmation of what was asserted upon the argument, that the eighteenth finding merely declared the court's conclusion that, although the arrangement had been that Mr. Cleary should make and close a sale on behalf of his principal if he had an opportunity at the price fixed, such arrangement did not constitute an authority to

execute the written instrument on which the plaintiff relied. All these considerations constrain us to the view that such is the true meaning and construction of the eighteenth finding, and that the case comes to us with no finding by the court below upon the disputed question of fact on the resolution of which the rights of the parties must depend.

Being thus without such finding, three courses are open to us on appeal. If the evidence clearly supports the judgment, we should affirm it. *Jones v. Jones*, 71 Wis. 520; *Raipe v. Gorrell*, 105 Wis. 636. Failing this, if the question is in doubt and uncertain, so that a decision here might work injustice, we should reverse and remand for further trial. *Kemp v. Seely*, 47 Wis. 687; *Cramer v. Hanaford*, 53 Wis. 85, 88; *Hill v. Am. S. Co.* 107 Wis. 19, 28, 34. But if an examination of the evidence discloses with reasonable certainty a preponderance in favor of the plaintiff's contention, it is our duty to direct judgment in accordance therewith. *Maldaner v. Smith*, 102 Wis. 30, 41; *Hamilton v. Menominee Falls Q. Co.* 106 Wis. 352; *Hill v. Am. S. Co.*, *supra*. We proceed, therefore, to an examination of the evidence.

Mr. Cleary's testimony as to the only interview in which authority was given is as follows: "He told me to sell it if I could, and gave me the prices upon the property. The price on the back lot that McBride bought was $1,500, and upon the front lot upon which his (*Griswold's*) house stood it was $3,500. My commission was to be $50 on the back lot, and $100 on the front one." The respondent's version was substantially as follows: "I asked him what he would charge me to find a customer for me, in case I concluded to sell it, and I fixed my price at $5,000. To my question he replied that he would charge me $25. I says, 'That's reasonable, Tom.' And I says, 'If you succeed in finding some one that will pay my price, I think probably I will be willing to pay a little more.' . . . In any case, he was to

correspond with me and receive instructions from me in regard to either selling or renting; and when I left — a few days before I left — I said to him, 'If you hear of any one that wants to buy, just let me know.'" These conversations shortly preceded respondent's departure from Platteville, which took place about August 1, 1892. The first letter which Mr. Cleary writes was August 23, 1892. It commences, "Dear Friend: No sale made as yet;" then goes on with some information about renting, sales of other property in the vicinity, and possibility of subdivision of the premises. This was followed by a further letter discussing the subject of renting and terms thereof. To the two letters reply was made by defendant on September 2d, discussing merely the subject of renting, repairs, etc. The following spring, March 30, 1893, Mr. Cleary writes: "There are now again inquiries for real estate in this city. Mort Eastman and Max Sickle have inquired as to prices on your property. I do not like to give them terms now before consulting you again. It is now some time since I heard from you, and since that time you may have changed your mind." It recites his remembrance of the prices, and says: "Now, if those terms are to stand, let me know at once. Of course, *you said I might*, if I remember correctly, *sell* the back lot for some less, but I have now forgotten the exact figures, and I wish you to repeat instructions." To that, April 2d, respondent replies: "I am still disposed, for a time at least, to stick to my original figures. . . . Do the best you can to secure my figures,"— and suggests possible modifications in price. Nothing appears to have been accomplished during that year until January 12, 1894, when Mr. Cleary writes: "I have occasionally been asked whether you still wished to sell those back lots. I think Morton Eastman is nearly ready to buy them if you wish to sell them. I have told him all the time the price was $1,500 for your back lot. I didn't want to make a *bargain* with

him now, until I heard from you again, because you might have changed your mind since I heard from you last. Perhaps you intend to come back again to live here. I hope you do." To that *Griswold* replied, January 19th, "Will say, in regard to my back lot, that it is still for sale and that my price still remains the same, $1,500;" and closes, after suggesting certain changes in line and offering to sell the front lot at $3,500, with the words, "Hope you will be able to *make a sale.*" Then follows a letter from Cleary of March 14, 1894, indicating difficulty in getting $1,500 for the back lot, and probability of $1,400; and on March 16th *Griswold* writes, hoping to get the $1,500, but says: "I would like you to use your own judgment in the matter, keeping in mind my best interests. While I am rather inclined to think from the tone of your letter that he can be induced to pay $1,500, if you think otherwise you may offer it to him for $1,450. And if, in your opinion, $1,400 is most he will pay for it, let her slide at that. . . . At whatever price back lot is sold, it must not measure longer in depth (north and south) than front lot. . . . I hope that you will be able to make a sale to McBride, as he will probably build a pretty good house." On March 22d Cleary writes: "Dear Friend: *I sold the back lot* to-day to John McBride for $1,400.00. It was the best that I could do. . . . I made a written contract with him, a copy of which I herewith inclose you." To this letter no reply was made, but on March 29th Cleary sent deed in fulfilment of the contract of sale, which the defendant promptly executed, and returned with instructions to deliver in accordance with the written agreement of sale, which, by the way, was signed by the purchaser, McBride, and by "*O. F. Griswold*, by T. L. Cleary, Agent." In remitting the proceeds, Cleary deducted $50 for his commission, together with certain other expenses, and defendant responded that he saw nothing in the deductions to object to.

Thereafter, through the years 1894 and 1895, more or less correspondence took place between the parties, consisting mainly of discussion of prices and possible customers, all at less than the $3,500 which had been named as the selling price, and indicating a mutual understanding between the parties that the latter was a pretty high figure, and that possibly less than that might be accepted. The only letter of much significance is one of May 16, 1895, after Cleary was already in negotiation with the plaintiff, of which he had written defendant, who replied with reference to some negotiation he himself was having with one McCoy. He says: "I write him to-day that a short time ago *you had an out-of-town* customer for it on the string, and that before making him (McCoy) a price I would like to hear from you. I suppose that *your customer*, Mr. B., does not want it at the price made him; but I would like to hear from you first, anyway. Please favor me with a reply as soon as possible, and give me an idea of about the best price you can get out of your man." The last letter passing between Cleary and defendant was on October 21, 1895, having reference to the possibility of subdividing the tract so as to get the $3,500 out of it, but in no wise indicating a withdrawal of that as the price of the whole. In May, 1896, plaintiff, *Brown*, wrote direct to *Griswold*, explaining that Mr. Cleary had been absent for a few days, and offering $3,250 for the property. To this defendant replied on May 25th, declaring $3,500 to still be defendant's price for the property. This letter was shown to Cleary, as he thinks, before the closing of the sale with *Brown*. On June 2d *Brown* came to Cleary, and accepted the price which had been made to him by Cleary and confirmed by this letter from defendant; whereupon Cleary drew up a written memorandum of the agreement, and acknowledgment of the payment of $100 earnest money, the remainder to be paid upon delivery of deed, and signed it in the name of *Griswold*. He telegraphed defend-

ant of the sale, adding the words, "Wire answer whether all right," and at the same time wrote a letter in which he explained that inquiry as due to the fact that the sale to *Brown* was dependent on whether a sale to any one else had been previously closed by the defendant direct. Defendant responded by telegram, "Sale to *Brown* all right, if there are no commissions and abstract not required." Correspondence followed, in which Cleary insisted that the sale was at $3,500, to be paid by *Brown*, and the question of commissions was between himself and the defendant; whereupon defendant sought to repudiate the authority, and, after suit was commenced, made a sale to one McCoy, the deed being signed by *Griswold* and wife, for $3,600, McCoy having full knowledge of plaintiff's claims and commencement of suit, and promising the defendant to protect him against any liability thereon.

As we have stated before, the question is, What was the arrangement originally made between Cleary and the defendant? for there is nothing in the correspondence to modify or change that, except, perhaps, as to price. A significant thing is that the earliest correspondence following that arrangement assumes authority in Cleary to make a sale. His very first letter takes occasion to inform defendant that no sale is yet made,—an utterly meaningless remark, if, as defendant claims, he was only to submit customers. Cleary's view is confirmed by frequent remarks in defendant's letters indicating his understanding that Cleary was to make a sale, and most cogent of all is the fact that Cleary, a lawyer of standing and reputation, obviously devoted to the interest of his friend and neighbor, the defendant, at the first opportunity to obtain the price which defendant had named, considered himself authorized to make a binding written agreement of sale, and to that understanding defendant gave assent in everything except direct words. He approved, he executed deed, acknowledged his duty to make title and fur-

nish abstract as that writing provided, and also passed, not only without dissent, but with approval, the charge of $50 commission, which, according to Cleary's testimony, was stipulated in advance, but which is wholly inconsistent with defendant's narrative of the original conversation. This is enough of itself to fully establish the correctness of Cleary's version of their arrangement as against that of the defendant himself, without placing weight upon the fact that Cleary is a disinterested witness between the parties. There is nothing in the subsequent correspondence to modify this conclusion in the least, and many remarks tending to confirm it. There is nothing to indicate any raising of the price, and, indeed, the letter to *Brown* only a week before the sale was made establishes that the defendant considered $3,500 as still the price, the same having theretofore been fixed by him and stated to plaintiff by Cleary. Upon the correspondence subsequent to the sale which is now attempted to be repudiated we place very little weight. The controversy had then arisen, and declarations then made by the defendant in his own favor are not receivable in evidence, or, if received, are not entitled to weight. Suffice it to say that throughout that subsequent correspondence Cleary insisted firmly on the correctness of his version of his authority, as afterwards testified to by him.

This is the whole controversy. The only two witnesses to the transaction have testified in full. The entire correspondence is before us. We have not the slightest doubt where the true preponderance of evidence is, and can see no reason to expect that anything could be gained by further trial or investigation of this mooted question. It therefore becomes our duty to reverse, and to direct entry of such judgment as the circuit court should have rendered upon this evidence. As against defendant, no reason is apparent why specific performance should not be decreed. He has, perhaps, disabled himself from making a conveyance which,

alone, will be effective to transfer the title, but he has done so since suit was commenced, and to one who, while not a party, can have no rights greater than the defendant, since he purchased not only with the constructive notice resulting from the filing of the complaint and *lis pendens*, but with the actual notice resulting from plaintiff's industry in serving upon him a copy of the notice of *lis pendens*. A decree acting directly on the title to this land will therefore be as effective against McCoy as against the defendant himself. Sec. 3187, Stats. 1898; *Newton v. Marshall*, 62 Wis. 8. Since a mere command to the defendant *Griswold* to execute a deed to the plaintiff would not secure to the latter the rights to which he is entitled, a decree should be entered which, upon payment of $3,400, of its own force transfers to the plaintiff all of the title which the defendants had at the time of the commencement of the suit, whether now vested in them or in any person claiming under them subsequent to that date, and which may be recorded in the registry of deeds.

By the Court.— Judgment reversed, and cause remanded with directions to enter judgment in favor of the plaintiff in accordance with this opinion.

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115 552

MARTIN, Respondent, vs. EASTMAN, Appellant.

February 4 — February 26, 1901.

(1, 2) *Justices' courts: Appeal: Jurisdiction: Counterclaim.* (3–6) *Sales: Evidence: Election of remedies: Warranties: Issues: Special verdict.*

1. If a justice of the peace has no jurisdiction of the subject matter to render a judgment, the circuit court obtains no jurisdiction by virtue of an appeal from such judgment.
2. The interposition of a counterclaim under sec. 3626, Stats. 1898, for an amount in excess of the jurisdiction of the justice, does not

oust the justice of jurisdiction, but the counterclaim may properly be stricken out.

3. In an action to recover the contract price of a heating plant, when defendant was asked to state its value, the court expressed a doubt as to his competency to give an opinion, he not being shown to be an expert. Thereupon he was asked whether as a heating apparatus it had any value to him, and he replied that it had no value to him for any purpose. *Held*, that there was no error prejudicial to defendant.

4. The statement of a witness who had testified to a conversation in his presence between the parties, that he had been under an impression, at some time, that he heard the plaintiff or the defendant say that a certain sum had been paid on the contract in suit, is too indefinite to render its exclusion error.

5. In an action to recover for a heating plant, where defendant had counterclaimed for the amount he claimed to have paid thereon, he was properly required, at the close of the testimony, to elect whether his claim would be for a breach of warranty or a rescission of the contract.

6. The complaint in such case alleged sale and delivery of a furnace and a certain amount of piping and radiation previously selected and designed by defendant. Defendant, by way of answer and counterclaim, set up an express warranty to heat the house, and a breach thereof. This was denied in the reply. Upon the trial of such issue plaintiff's evidence tended to show an express refusal to warrant, and the jury found that there was no warranty. *Held*, that defendant was not in a position to claim error for failure to submit to the jury the question of an implied warranty of suitableness.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Affirmed.*

For the appellant there were briefs by *Spensley & McIlhon*, and oral argument by *Calvert Spensley*.

E. C. Fiedler, for the respondent.

CASSODAY, C. J. This action was commenced in a justice's court to recover $156.32, and interest from January 1, 1895, as the balance due the plaintiff for the erection and construction of a hot-water heating plant for the defendant, at his instance and request, and certain items of extras to the

amount of $25. The defendant answered by way of admitting such amount for extras to the extent of $21.32, and denials and counter allegations as to the balance, to the effect that he had paid thereon $275, and also alleged, by way of a counterclaim, in effect, that the defendant agreed and warranted that such heating plant would be free of all mechanical defects, and a first-class job as to labor and materials, and of such capacity, when put in according to the agreement, as to heat all the rooms in the defendant's residence in which radiation should be placed to the temperature of 70° Fahrenheit in the coldest weather, and for which the defendant was to pay $335, the price alleged in the complaint; that the plaintiff's firm utterly failed to comply with such contract and warranty, and that the heating plant was of no value whatever; that the defendant notified the plaintiff's firm of such failure during each of the six preceding years, and demanded that they remove such heating plant or make it comply with the warranty; and claimed $275 damages by reason of the breach of such warranty, for which sum, less the $21.32, admitted, to wit, the sum of $253.68, the defendant prayed judgment. The plaintiff demurred to such counterclaim for insufficiency, and also moved to strike out such counterclaim, for the reason that it was beyond the jurisdiction of the justice, which motion was granted. The defendant thereupon declined to further appear before the justice, and thereupon, and on proofs made on August 21, 1899, the justice rendered judgment in favor of the plaintiff, and against the defendant, for $196.32, damages and costs. From that judgment the defendant appealed to the circuit court. That court refused to grant the defendant's motion to strike the cause from the calendar and dismiss the action on the ground that the justice had lost jurisdiction by the interposition of the counterclaim and hence that the circuit court got no jurisdiction. The circuit court, on the defendant's

motion, thereupon ordered such counterclaim to be reinstated, and that the plaintiff be permitted to reply to the same, which things were done accordingly.

The cause was tried upon such issues, and at the close of the trial the jury returned a special verdict (the first, second, and eighth answers being by the direction of the court), to the effect (1) that the plaintiff did contract to put into the defendant's house in the fall of 1893 a hot-water heating plant for $335, and the defendant agreed to pay that price for such plant; (2) that the defendant paid to the plaintiff, after such plant was put in, to wit, January 3, 1894, the sum of $200 on such contract; (3) that the defendant did not pay to the plaintiff on such contract $75 in the fall of 1893; (4) that the plaintiff did not warrant such heating plant; (8) that the defendant owed the plaintiff on account $21; (9) that at or about the time this action was commenced the plaintiff requested the defendant to pay him the balance due on the contract. Thereupon, and in pursuance of the order of the court, judgment was rendered in favor of the plaintiff on such special verdict for $194.40 damages and $39.04 costs. From that judgment the defendant brings this appeal.

1. Counsel for the defendant is undoubtedly correct in claiming that, if the justice had no jurisdiction of the subject matter to render the judgment, then that the circuit court got no jurisdiction by virtue of the appeal. *Cooban v. Bryant*, 36 Wis. 605; *Henckel v. Wheeler & W. Mfg. Co.* 51 Wis. 363, distinguished in *Mathews v. Ripley*, 101 Wis. 100, 102. There is no claim that the justice did not have jurisdiction of the plaintiff's cause of action. Since the justice had jurisdiction of that cause of action, the simple question presented is whether the justice was ousted of such jurisdiction by the defendant's interposition of a counterclaim for an amount beyond the jurisdiction of the justice. The justice only had such jurisdiction as was given him by stat-

ute. By virtue of the statute, he had jurisdiction to the amount of $200. Sec. 3572, Stats. 1898. Had the plaintiff's claim exceeded that amount, the justice would necessarily have been precluded from taking jurisdiction. *Id.* We perceive no reason why the defendant is not subject to the same limitation. True, another section of the statute authorized the defendant, by way of answer, to allege facts constituting a counterclaim as well as a defense. Subd. 4, sec. 3626, Stats. 1898. But that section must be construed with the other, limiting the jurisdiction as mentioned. As stated by counsel for the defendant, "the counterclaim is, in substance, an action by the defendant against the plaintiff." For that reason, the justice was precluded from taking jurisdiction of the defendant's counterclaim for more than $200. It follows that such counterclaim was properly stricken out by the justice.

2. Error is assigned because the court refused to permit the defendant to state what the value of the heating plant was. Upon being asked its value, the court merely expressed a doubt as to the defendant's competency to state the value, as it had not been shown that he was an expert on that question. Thereupon the defendant was asked by his counsel whether, as a heating apparatus, the furnace was of any value to him, and he answered, "No," and that it had no value to him "for any purpose." Certainly, this does not present any reversible error.

3. Error is assigned because the defendant's witness Penhallegon was permitted to state, on cross-examination, that it was worth $425 to put in the kind and style of heating plant that he had figured on as a job for the defendant, and that he had told the defendant what he would do the job for and given him prices. This appears to have been legitimate cross-examination.

4. Error is assigned because the court refused to permit the witness Hutchinson to testify that the plaintiff, in his

presence, acknowledged that the defendant had paid him $75. The difficulty seems to have been in the defective memory of the witness. He was allowed a considerable latitude, but was unable to say that he had heard such acknowledgment or any express or implied admission of such payment, but did say that he had been under an impression, at some time, that he heard the plaintiff *or* the defendant say that $275 had been paid. If the plaintiff made or acquiesced in any such statement, it would have been competent; but if the defendant made any such statement in the absence of the plaintiff, it would have been incompetent. We cannot hold that there was any reversible error in excluding it.

5. Certainly there was no error in requiring the defendant, at the close of the testimony, to elect whether his claim in this case would be for a breach of warranty or a rescission of the contract. *Park v. Richardson & B. Co.* 81 Wis. 399; *McLennan v. Prentice*, 85 Wis. 427. The defendant could not at the same time affirm and disaffirm the contract. *Id.*

6. Error is assigned because the court refused to submit to the jury two questions requested, as to whether the heating plant was sold to the defendant for the particular purpose of heating his residence for dwelling purposes, and whether it was reasonably fit and sufficient for such purpose. The complaint expressly alleged that the furnace, and a certain amount of piping and radiation which the defendant had previously selected and designed, were sold and delivered to the defendant. The evidence on the part of the plaintiff tended to prove that such sale and delivery were made without any warranty, and with an express refusal to warrant. The defendant, by way of answer and counterclaim, denied such allegations, and alleged the express agreement and warranty referred to in the statement of facts. As indicated, the jury found that there was no war-

ranty. Having gone to trial upon the direct issue thus expressly made, the defendant is in no position to successfully claim error for failure to submit to the jury the question of such implied warranty. *Milwaukee B. Co. v. Duncan*, 87 Wis. 124, 125, and cases there cited; *J. I. Case P. Works v. Niles & Scott Co.* 90 Wis. 602, 603; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.* 91 Wis. 672, 673. The jury found, in effect, that the defendant got just what he bargained for, and without any warranty. We must hold that such findings are supported by the evidence.

By the Court.— The judgment of the circuit court is affirmed.

FRYE, Respondent, vs. THE VILLAGE OF HIGHLAND, Appellant.

February 4—February 26, 1901.

Adverse possession: Permissive use of private way: Disseisin: Highways: Dedication: Intention.

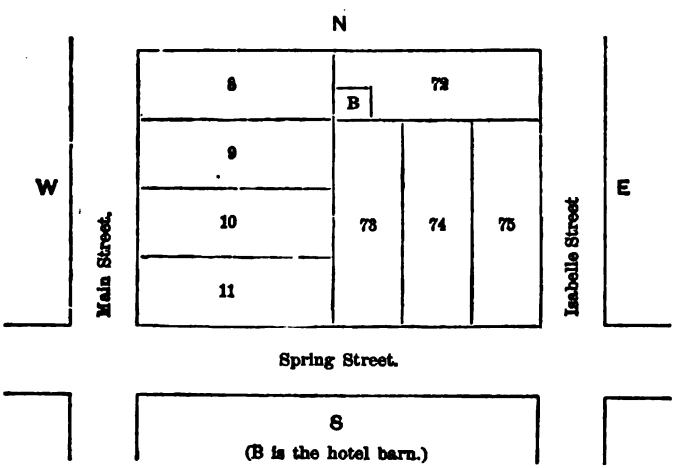
1. While the owner of a hotel was using part of the premises as a private way to the hotel barn, the owner of the adjoining lot commenced to use the same way as a means of access to and egress from the back part of his lot. *Held*, that such use by the adjoining owner would be presumed to have been permissive, in the absence of evidence to the contrary, and therefore could not ripen into title by adverse possession.
2. Occupancy commencing by permission of the true owner cannot operate as a disseisin until it becomes visibly in defiance of his rights.
3. There can be no highway by dedication in the absence of an intention to surrender the premises to the public for a thoroughfare.

APPEAL from a judgment of the circuit court for Iowa county: GEORGE CLEMENTSON, Circuit Judge. *Reversed.*

Action for relief for obstructing an old traveled way which plaintiff claimed the right to use. The action was in equity for a mandatory injunction requiring the removal of

the alleged obstructions. Two grounds were alleged as the foundation of plaintiff's claim: first, that she was the owner of the right of way by adverse use for more than twenty years; second, that it was a public way in which she had a special interest.

Plaintiff's husband purchased the north twenty-two feet of lot 9 of the village of Highland, Iowa county, Wisconsin, about the year 1879. Such property was bounded on the west by Main street, on the south by the remainder of lot 9, on the north by lot 8, and on the east by lot 73. Plaintiff and her husband resided on the property from about the day of such purchase till he died, and thereafter she continued to so reside up to the time of the commencement of the action. She became the owner of the property under her deceased husband. When such residence commenced, for a long time prior thereto, and some time thereafter, there was a traveled way from Main street along the south part of lot 8 to the vicinity of the southeast corner thereof,



thence southeasterly across the northeast part of lot 9 to lot 73, thence south along the west side of lot 73 to Spring street. From 1872 to about 1880 there was a hotel on the

south two-thirds of lot 9, and a barn used in connection therewith on the southwest corner of lot 72, which corner was identical with the northeast corner of plaintiff's property, with the southeast corner of said lot 8, and the northwest corner of lot 73. The barn was reached from Spring street by the traveled way along the west side of lot 73, and from Main street by the traveled way along the south side of lot 8. As before indicated, the two traveled ways connected with each other by passing over the northeast part of lot 9, being of that portion thereof owned by plaintiff's husband and now owned by her.

The hotel property was purchased in 1875 by a Mrs. Patrick, together with the south twenty-four feet of lot 8 and the west rod of lot 73, covering the two traveled ways mentioned. Thereafter, as long as such hotel property was used as such, the two strips of land were devoted by the owner to the use of the patrons thereof, but she allowed all persons to use the same who desired to do so in going to and from points reached thereby, and also allowed the plaintiff and her predecessor in title to use the same as they desired in connection with the north one-third of lot 9. The hotel barn was used for some time after 1880, and the two ways were also used in connection therewith. The way on lot 8 was the means by which access to and egress from the back part of the north one-third of lot 9, and access to the back part and north door of plaintiff's house, were obtained. It was used continuously for all the purposes of travel incident to the ownership of said north one-third of lot 9, from the time plaintiff's husband purchased the same till it was obstructed by the defendant, covering a period of more than twenty years. During the entire period it was also used for travel by all persons who desired to do so, plaintiff and her predecessor in title not claiming any better right to use the way than any other person.

About ten years before the act complained of occurred,

plaintiff fenced the back part of her lot, thereby shutting off the connection between the two ways. About that time the owner of lot 8, Mrs. Patrick, commenced to construct a fence to shut off the common use of the traveled way on lot 8, no complaint being made by plaintiff in regard thereto. Before completing her purpose, Mrs. Patrick abandoned it, leaving the way open to use as theretofore. Some four years prior to the act complained of, plaintiff sold the back part of her lot for the purposes of a creamery. A creamery was thereafter constructed and operated thereon, and in reaching it from Main street those desiring to do so passed over lot 8, using the old traveled way. When plaintiff moved onto the lot there were some loose boards laid along the south boundary line of lot 8 for use in passing from the north door of her house to Main street. The boards were in time taken up and a sidewalk constructed in their place.

The owner of lot 8, as indicated, used the way thereon in connection with her hotel property so long as it was operated as such, and thereafter for some years, reaching to a time subsequent to 1880, and permitted all other persons, including plaintiff, to do so without objection. Defendant placed the village engine house so as to obstruct said way, having obtained legal title to the land for village purposes. When the work of so locating the engine house was in progress plaintiff made no claim that it was an infringement upon her rights. She made some requests for favors in regard to the precise location of the building, and that was all. No proof was offered as to the width of the traveled way as actually used. The indications from the evidence were that such use was sufficient to permit persons to pass with teams, hauling loads of hay or wood. Plaintiff testified in part as follows: 'I never claimed any right to that alley when we went to live there. Did not know we had any right there. We simply used it. We claimed no right except to use it. I always thought it was a street for every-

body. I made no claim to it then, except I thought it was a street. I piled wood in the alley because it was convenient. I never acquired any right to pile wood in the alley, except because it was public. People, generally, used the alley.'

The court found that plaintiff was the owner of an open, unobstructed easement or right of way twenty-two feet wide on the south side of lot 8, extending from Main street more than 100 feet east, to and beyond where the engine house of the defendant was located, the south side of the right of way being north of plaintiff's premises on lot 9; that the said right of way was obstructed by defendant as claimed by plaintiff, and that upon demand by plaintiff for the removal of such obstruction the defendant refused to comply therewith; that plaintiff was entitled to the relief demanded in the complaint. Judgment was rendered accordingly. Exceptions were duly filed sufficient to raise the questions discussed in the opinion.

For the appellant there was a brief by *Spensley & McIlhon* and *Arthur J. Egan*, and oral argument by *Calvert Spensley*. To the point that, from the fact that a way is kept open and used by the owner for his own purposes, it may properly be inferred that the use of it by others was by his consent, they cited *Harper v. Parish of Advent*, 7 Allen, 478; *Hall v. McLeod*, 2 Met. (Ky.), 98; *Stevens v. Dennett*, 51 N. H. 324; Jones, Easements, § 270, and cases cited in note 3; Id. § 288, and cases cited in note 4; *Cook v. Gammon*, 93 Ga. 298; *Burnham v. McQuesten*, 48 N. H. 446–454; *Whaley v. Jarrett*, 69 Wis. 613, 616; *Plimpton v. Converse*, 44 Vt. 158; *Bennett v. Biddle*, 140 Pa. St. 396; *S. C.* 150 Pa. St. 420; *Harkness v. Woodmansee*, 7 Utah, 227; *Davis v. Brigham*, 29 Me. 391; *Smith v. Higbee*, 12 Vt. 113; *Day v. Allender*, 22 Md. 529; *Dodge v. Stacy*, 39 Vt. 566; 19 Am. & Eng. Ency. of Law, 17; *Kilburn v. Adams*, 7 Met. 33.

For the respondent the cause was submitted on the brief of *J. P. Smelker.*

MARSHALL, J. We fail to discover in the record any support for the findings of fact, so called. They are so clearly wrong that it seems they must have been influenced by erroneous notions of principles of law applicable to the evidence. Respondent has the legal right to the use of an alley twenty-two feet wide on lot 8, bounded by the south side of said lot and reaching back more than 100 feet, acquired by adverse possession thereof for more than twenty years, according to the decision appealed from. Yet there is no evidence of any essential element of such possession. The true owner was never disseised, as it appears, for an instant, by plaintiff or any person in whose right she claims. Such owner used the alley for a time as a necessary part of an entire hotel property, it being the only way possessed by her for reaching the hotel barn from Main street or going direct to such street from the barn. After the discontinuance of the hotel she continued to use the alley as a private way to the barn till well into the alleged twenty years of adverse possession. Those who patronized the barn must be presumed to have used the alley, provided by the owner for reaching it, as her property, by her invitation; and those who used it who were not her patrons must, under the circumstances, be presumed to have done so by her indulgence, there being no evidence to the contrary. The latter class of persons includes respondent and those under whom she claims. Their use commenced when the alley was clearly a private way for reaching the hotel barn. That circumstance indicates that the use was permissive, and there is no evidence that it changed to a hostile character at any time. The rule is elementary that permissive use, however long continued, will not ripen into title by adverse possession. *Pettigrew v. Evansville*, 25 Wis. 227; *Fryer v. Warne*, 29 Wis. 511; *Wilkins v. Nicolai*, 99 Wis. 178.

Respondent's counsel seems to think the case is ruled by *Carmody v. Mulrooney*, 87 Wis. 552, and *Wilkins v. Nicolai*, *supra*. In our view those cases condemn the judgment appealed from at all points. They rest on the doctrine that an unexplained, continued use of land for twenty years raises a presumption that it was characterized during the whole period by all the essentials of adverse possession, and *prima facie* establishes it, but that such presumption may be overcome by evidence that the occupation was under some license, indulgence, or special contract inconsistent with the claim of right by the occupant. Here, there was no unexplained use for twenty years, or for any other period. The occupancy at the commencement was neither exclusive nor hostile. It is perfectly explained by the proof that the way was established for the convenience of the owner of the fee as the means of reaching the hotel barn, and that those not using it by invitation, as before indicated, did so by mere indulgence.

One of the foundation principles of adverse occupancy is that it must be of such a character as to challenge the right of the true owner to disturb it and to make that challenge sufficiently significant that such owner will not be liable, without negligence, to fail to discover its existence. That is necessary in order to satisfy the requisites of disseisin. An occupancy that commences by permission of the true owner cannot operate as a disseisin of him till his right is denied and the denial made sufficiently obvious to reasonably call upon him to act if he does not intend to submit to the changed attitude of the occupant.

The statute of limitations by means of which the title to property may be taken from one person and bestowed upon another, is grounded on laches. So occupancy, disseising the true owner, does not exist until it is visibly in defiance of the true owner's rights. *Lampman v. Van Alstyne*, 94 Wis. 417. It does not operate to deprive the true owner of

his title unless it continues uninterrupted in the same right for the full statutory period. There being no indication of hostile use in this case, it seems useless to continue the discussion.

The trial court does not appear to have considered the claim that the alley was a public way and became so by dedication or continued adverse use. The evidence on that branch of the case would not sustain a decision in respondent's favor. It does not show any intention to surrender the premises to the public for a thoroughfare, and without that there can be no highway by dedication. *Tupper v. Huson*, 46 Wis. 646. The way in its inception, as before indicated, was private. The fact that persons other than those who used it by invitation were permitted to do so does not militate against its private character. Being private at the start, it would require unmistakable evidence of a change to a public thoroughfare, and uninterrupted use as such for the statutory period, to give it the character of a highway by user. Nothing of that kind appears.

By the Court.— The judgment is reversed, and the cause remanded with directions to dismiss the complaint and render judgment for defendant for costs.

PRAHL, Respondent, vs. THE TOWN OF WAUPACA, Appellant. 109 113 299 [1]561

February 5 — February 26, 1901.

Highways: Sufficiency: Court and jury: Evidence.

1. The question whether a highway at the place where an accident occurred was insufficient and unsafe for public travel is always one for the jury unless the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy.
2. In this case the question whether a turnpike eleven feet wide and eighteen inches high with abrupt banks, across which a culvert without guards had been constructed, the traveled track being one

and one-half feet from its south end, was insufficient and unsafe, so as to render the town liable for injuries sustained by a traveler whose horse shied at drain pipes piled by the roadside and ran the buggy off the culvert, is *held* to have been for the jury.

8. In such a case evidence of measurements, made more than a year after the accident and after material changes had been made in the turnpike, was properly rejected.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

The purpose of this action is to recover damages for injuries sustained by the plaintiff upon an alleged defective highway in the defendant town. The accident is alleged to have occurred by reason of plaintiff's horse becoming momentarily frightened at some drain pipes left in the highway near the traveled track. The jury, by a special verdict, found that the accident occurred at a culvert on a turnpike eleven feet wide and eighteen inches high, with abrupt sides. They also found that the drain pipes were located on the north side of the road, a rod or thereabouts east of the culvert. The plaintiff's horse became frightened at the pipes, and while momentarily beyond control ran the buggy off the culvert, and caused the accident. By the tenth and eleventh questions and answers, the jury found that the highway at the place of the accident was in a defective and unsafe condition for public travel, which was the proximate cause of plaintiff's injuries. Other facts not material to the questions raised were found. Damages were fixed at $400. Plaintiff moved for judgment, and defendant to set aside the answer to question 2, regarding the width of the turnpike, changing it from eleven to twelve feet, and also asked the court to disregard answers to questions 10 and 11, and for judgment for defendant. Plaintiff's motion for judgment was granted, and defendant appeals. The questions raised for consideration are that the court rejected proper evidence offered by defendant; that the court erred in not setting aside the answer to the second question; and that a

verdict should have been directed for defendant on the ground that the evidence did not show the highway was defective.

For the appellant the cause was submitted on the brief of *Connell & Hart*, attorneys, and *Cate, Lamoreux & Park*, of counsel. They cited *Wheeler v. Westport*, 30 Wis. 392; *Loberg v. Amherst*, 87 Wis. 634; *Bodah v. Deer Creek*, 99 Wis. 509.

For the respondent there was a brief by *F. J. Feeney*, attorney, and *James H. Feeney*, of counsel, and oral argument by *F. J. Feeney*. To the point that a ditch two feet deep close to the traveled track of a highway with no rails or barriers is not only an insufficiency but dangerous to the public travel, they cited *Seymer v. Lake*, 66 Wis. 651; *Hein v. Fairchild*, 87 Wis. 258, 262, 264; *Dreher v. Fitchburg*, 22 Wis. 675; *Chappell v. Oregon*, 36 Wis. 145; *Fritsch v. Allegheny*, 91 Pa. St. 226; *Hinckley v. Somerset*, 145 Mass. 326.

BARDEEN, J. The main question litigated in the trial court, and the one urged with greatest vigor on this appeal, is that the highway was not shown to be in such a state of insufficiency or want of repair as to render defendant liable for plaintiff's accident. The facts regarding the exact condition of the highway were in sharp dispute. The accident occurred at a culvert in a narrow turnpike, in a depression between two hills. The testimony regarding the width of the culvert and the height of the turnpike was conflicting. The jury found the culvert was eleven feet wide, and the turnpike was eighteen inches high, and with abrupt banks. There is evidence to support these conclusions, and they must stand as verities in the case. The plaintiff was traveling west. Just before reaching the culvert the horse shied at some drain pipes left in the highway by the town authorities on the north side of the turnpike, and the buggy ran off the south end of the culvert, and plaintiff was

thrown out and injured. The place was without guards. The face of the turnpike was smooth. The usual traveled track was about one and one-half feet from the south end of the culvert. The jury found, under proper instructions, that the road was insufficient and unsafe for public travel. That question is always one for the jury, unless the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. If, in the exercise of reason and with impartial judgment, a jury has found the highway to be insufficient, their finding must stand, unless we can say that the evidence, and the legitimate inferences therefrom, are so clear and decisive that no reasonable or unbiased man would have reached that conclusion. The rule is akin to that applied in cases of contributory negligence, of which there are many in the books. See *Powell v. Ashland I. & S. Co.* 98 Wis. 35. When the condition shown is such that different minds may reasonably draw different inferences and arrive at different conclusions, the jury, and not the court, must make the ultimate determination. It must be confessed that this case is very close to the border line. At the same time, we are not convinced that we ought to say that the highway was reasonably safe, as a matter of law. When we come to consider the width and height of the turnpike, and the surrounding conditions referred to, there is, at least, some room to say that it was not reasonably adequate or sufficient for public travel. The jury and the trial court have said so, and the inferences against it are not so clear and strong that we feel justified in overturning that conclusion. *Gorr v. Mittlestaedt*, 96 Wis. 296. See *Chappell v. Oregon*, 36 Wis. 145; *Hein v. Fairchild*, 87 Wis. 258.

The defendant sought to introduce testimony of measurements made by a witness a year or more after the accident. The evidence is undisputed that changes in the turnpike

had been made after the accident, and before the measurements were made, to such an extent as to leave no reasonable basis therefor. The rejection of such evidence was fully justified.

By the Court.—The judgment is affirmed.

THE COMPUTING SCALE COMPANY, Respondent, vs. CHURCHILL, Appellant. 109 303 / 113 *507

February 6 — February 26, 1901.

Setoff: Corporations: Succession: Written contracts: Oral modification: Pleading.

1. Where one corporation has purchased the business of another, a person who purchases goods belonging to the successor corporation cannot, in an action by it for the purchase price, set off damages arising from breach of a contract between him and the original corporation, in the absence of evidence that the plaintiff became a party to that contract by assignment or otherwise.
2. Where a party has pleaded a written contract and its performance, he is not entitled to introduce evidence of an oral modification thereof which was not pleaded.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Gerhard M. Dahl, for the appellant.

For the respondent there was a brief by *Irving P. Lord* and *Edward E. Browne*, and oral argument by *Mr. Browne.*

CASSODAY, C. J. This action was commenced January 17, 1900, by the plaintiff, an Ohio corporation located at Dayton, against the defendant and one Johnson, as copartners, to recover $432, as the balance of an account for scales sold and delivered to that firm at their special instance and request by the plaintiff between March 15, 1899, and March 25, 1899, as per itemized bill of particulars attached to the

complaint, purporting to be issued by the plaintiff from Dayton, Ohio, with one shipment of March 15, 1899, to the amount of $150, and another of March 20, 1899, for $300, and a credit of $18. The answer of the defendant *Churchill* denied each and every allegation of the complaint, and alleged by way of a second defense and counterclaim that the purchase was made by the defendant individually from the Boston Computing Scale Company, a Massachusetts corporation, for $450, and that $18 had been paid thereon; that such purchase was so made by the defendant under a written contract for one year with the Boston company, dated November 1, 1898, purporting to give to Edward L. Churchill & Co. the general agency for the sale of the Boston computing scales in five states, therein named,— including Wisconsin,— containing, among other things, these provisions:

"Party of the first part agree that they will not, during the continuance of this contract, allot such territory to any other person or party, and will promptly stop any other agents or persons from selling scales to go into this territory upon being notified of such trespass. Party of the second part agree to purchase fifty scales a month for each and every calendar month until the expiration of this contract. Party of the second part further agree that failure to purchase this number of scales renders this contract null and void;"

— that Edward L. Churchill & Co., mentioned as party of the second part, was composed of the defendant alone; that he had fully performed on his part all the conditions precedent of the contract; that the Boston company had failed to perform, by allotting such territory and various parts thereof to other persons and parties before the expiration of the year, and had sold and disposed of its business to the plaintiff, and April 1, 1899, had refused longer to retain the defendant in its employ under the contract, and refused to sell to him scales as therein agreed, to his damage in the sum

of $2,000; that the plaintiff obtained the cause of action alleged in the complaint by an assignment from the Boston company; that the defendant's counterclaim accrued to him by reason of such failure of the Boston company to perform such written contract, and before the defendant had notice of such assignment.

The plaintiff, by way of reply, denied each and every allegation of the counterclaim. The action was discontinued as against the defendant Johnson, and notice thereof served and filed.

It is undisputed that the defendant had been agent for the Boston company under a written contract which expired on or about November 1, 1898; that about that time the Boston company drew up and signed a written contract as alleged in the answer; that the defendant did not sign that contract, and expressly refused to do so, November 14, 1898; that the plant and property of the Boston company was sold to this plaintiff January 30, 1899, and that the complete transfer thereof took place on or before February 10, 1899; that February 20, 1899, one Charles R. Luce, the former president of the Boston company, wrote to the defendant to the effect that that company had sold out its entire business to this plaintiff, and that the transfer took place a little over two weeks before that date, and advised him to make arrangements with this plaintiff for an agency; that February 25, 1899, the defendant received notice that the plaintiff had bought out the Boston company; that the scales purchased by the defendant were actually the property of this plaintiff, and that the Boston company had ceased to have any interest in them for more than a month and a half prior to the time when they were shipped to the defendant; that, upon the sale and transfer from the Boston company to this plaintiff being made, Charles R. Luce, who had formerly been the president of the Boston company, was immediately employed by the plaintiff herein upon a salary to continue

for a time the business of the plaintiff herein at Boston; and that he acted as such agent in the communications between him and the defendant in respect to such business during the months of February and March, 1899.

At the close of the trial, the jury, by direction of the court, returned a verdict in favor of the plaintiff for $455.40 damages, and from the judgment entered thereon, with costs, the defendant brings this appeal.

It is undisputed that the scales in question were the property of the plaintiff at the time they were ordered by and shipped to the defendant. It is undisputed that he was to pay the price alleged in the complaint, and that he never paid any part of such price, except as therein admitted. The only attempt to escape liability for the balance of such purchase price is by reason of the facts alleged in the defendant's counterclaim. That counterclaim is based upon the breach of an alleged contract between the defendant and the Boston corporation. There is no evidence tending to prove that the plaintiff was or became a party to any such contract by assignment or otherwise. A counterclaim "must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the" causes of action mentioned in the statute. Sec. 2656, Stats. 1898; *Lawrence v. Vilas*, 20 Wis. 381; *Schumacher v. Seeger*, 65 Wis. 394; *Blakely v. Twining*, 69 Wis. 238. It does not appear that the defendant ever had any dealing with the plaintiff other than the purchase of the scales in question, and there is no evidence that he ever had any claim or counterclaim against the plaintiff. True, as indicated in the adjudications cited, a setoff may be properly pleaded as a counterclaim; but the evidence fails to show that the defendant has any setoff against the claim of the plaintiff. It is admitted that the defendant never signed the contract set forth in his answer, but, on the contrary, expressly refused to sign it November

14, 1898. The only way the defendant claims to have become a party to such contract is that in a conversation with the president of the Boston company, December 12, 1898, he notified him that he had received a copy of that contract, and would accept it as their contract. Even if such notice was given and made the contract binding on the Boston company, yet it appears from the undisputed evidence that by the express terms of the contract, as quoted above, the same became null and void by the failure of the defendant to purchase fifty scales each month during the year. The defendant sought to avoid the force of that clause of the contract by attempting to swear that it was modified by parol in the conversation mentioned; but the court excluded such parol evidence on the ground that the defendant, having alleged the written contract and its performance, could not be allowed to prove a modification of such contract by parol. But, even if the defendant has a valid claim for damages against the Boston company for such breach of contract, yet it could not be available as a setoff or counterclaim in this action.

By the Court.— The judgment of the circuit court is affirmed.

STUBBINGS and another, Appellants, vs. CURTIS and others, imp., Respondents.

February 6 — February 26, 1901.

Conditional sale of standing timber: Reservation of title until payment: Rights of bona fide *purchaser: Estoppel: Filing contract: Evidence: Cross-examination: Appeal: Exceptions.*

1. The vendor of standing timber under a contract reserving title in himself until payment of the purchase price, who contemplated at the time of the sale that his vendees were to manufacture the logs and sell the lumber therefrom, and who so dealt and acted con-

cerning such lumber as to lead an ordinarily prudent man, to believe that his vendees were the owners thereof or that they had authority to sell the same and give title thereto, is estopped to assert his reserved title as against purchasers from said vendees who bought and fully paid for the lumber without knowledge of his title or of any facts to put them upon inquiry in reference thereto.

2. The original contract of sale in such case, being a contract for the sale of real estate, was not entitled to be filed in the city clerk's office, and evidence that it was so filed was inadmissible in an action against purchasers from the original vendees who are not shown to have had actual knowledge of that fact.

3. Where a witness is not a party, cross-examination relating to matters not gone into on the direct examination is properly excluded.

4. Refusals to give requested instructions cannot be reviewed on appeal unless exceptions thereto are taken and preserved in the bill of exceptions.

APPEAL from a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action to recover the value of a quantity of lumber alleged to have been the property of the plaintiffs, and to have been converted by the defendants in the year 1889. The complaint alleged that the plaintiff *Stubbings* was in the year 1886 the owner of certain pine lands, and that on the 20th of November in that year he sold the standing pine thereon to the defendants Leahy & Beebe for the sum of $45,000, by a written contract of sale, in which the title of said timber and the lumber to be manufactured thereof was reserved to the plaintiffs until the purchase price should be paid. The complaint further alleged that in the years 1888 and 1889 Leahy & Beebe cut and removed about 5,000,000 feet of said timber, and sold the same to the defendant *Curtis Bros. & Co.*, at Wausau, Wisconsin. The defendants by their answer denied any liability, and also claimed that *Stubbings* had by his conduct waived his reservation of title, and that the defendant *Curtis Bros. & Co.* purchased and paid for the timber in good faith and without knowledge of the plaintiffs' claim.

Upon the trial the question chiefly litigated was whether *Stubbings* by his conduct had estopped himself from asserting his title. It was not denied but that the *Curtis Bros. & Co.* received a quantity of logs cut from the *Stubbings* tract, amounting, as the jury found, to 900,000 feet, and converted the same into lumber, and paid Leahy & Beebe therefor, and sold the same to their customers.

A special verdict was demanded and returned as follows:

"(1) Did the plaintiff *W. H. Stubbings* and defendants Leahy & Beebe enter into the written contract for the sale of standing pine timber described in the complaint, and dated November 20, 1886, but which was in fact executed about one year later,—in the fall of 1887? *A.* (*by the court*): Yes.

"(2) Were there in the fall of 1886 verbal negotiations between said parties looking to a sale of the same timber, in which the parties verbally agreed upon the purchase price and times of payment thereof, and pursuant to which Leahy & Beebe paid $5,000 of the purchase price thereof, and commenced to cut and remove the timber therefrom; and did the said written contract, executed about one year after its date and the date of said verbal agreement, in fact change the times when deferred payments should be made, by extending the time of each of said deferred payments one year beyond the time fixed by said verbal agreement? *A.* (*by the court*): Yes.

"(3) Did plaintiff *Stubbings* own said pine timber at the time of said verbal negotiations and of the making of said written contract? *A.* (*by the court*): Yes.

"(4) Did said Leahy & Beebe cut and remove the said timber to their mill in Wausau, and there manufacture the same into lumber? *A.* (*by the court*): Yes.

"(5) Was the said lumber, or any part thereof, sold by Leahy & Beebe to defendant *Curtis Bros. & Co.* by written contract under date of March 18, 1889; and did said *Curtis Bros. & Co.* receive and convert the said lumber to their own use? *A.* (*by the court*): Yes.

"(6) Was the defendant *C. S. Curtis* at said times the agent and general manager of the said *Curtis Bros. & Co.;* and did he, as such agent and general manager, aid in the purchase and conversion of said lumber? *A.* (*by the court*): Yes.

"(7) What amount of lumber was so purchased and converted by the said *Curtis Bros. & Co.* by and with the aid of *C. S. Curtis*, as agent and general manager? *A.* 900,000 feet.

"(8) What was the value of the lumber so converted at the time it was so converted? *A.* $8 per M.

"(9) Did *Curtis Bros. & Co.* or *C. S. Curtis*, its general manager, have knowledge when said lumber, or any part thereof, was so converted, that the plaintiff *Stubbings* owned or claimed said lumber, or any right or interest therein. *A.* No.

"(10) If you answer the last (ninth) question 'No,' then did said *Curtis Bros. & Co.*, or *C. S. Curtis*, its general manager, have knowledge or notice of any fact or facts which would put a reasonably cautious man upon inquiry, and which would, had they been followed by reasonable diligence upon the part of said *Curtis Bros. & Co.*, or *C. S. Curtis*, its general manager, have led to their discovery of the fact that *Mr. Stubbings* owned the said lumber? *A.* No.

"(11) If you answer either of questions 9 or 10 'Yes,' then how many feet of lumber was so converted by defendants with knowledge that *Stubbings* owned and claimed the lumber, or was so converted with knowledge of any fact or facts which would have led an ordinarily prudent man to a discovery that *Stubbings* owned the lumber (as explained in question 10)? [Not answered.]

"(12) If to questions 9 and 10 you answer that said defendants converted lumber with knowledge that *Stubbings* owned it, or with knowledge of facts that ought to have led to a discovery by defendants that he owned it (the lumber), then state the value, when converted, of the lumber so converted with such knowledge. [Not answered.]

"(13) Did the plaintiff *Stubbings* so deal and act concerning the lumber converted by defendants as to lead an ordinarily prudent man to believe that Leahy & Beebe were the owners of said lumber, or that they had authority to sell and give a title to the said lumber? *A.* Yes."

The plaintiffs made a motion to set aside the verdict and for a new trial, which was denied by the court, and judgment of dismissal of the complaint was entered, from which the plaintiffs appeal.

For the appellants there was a brief signed by *Brown & Pradt*, and oral argument by *Neal Brown.*

For the respondents there was a brief by *Mylrea & Bird*, attorneys, and *Ryan, Hurley & Jones*, of counsel, and oral argument by *M. A. Hurley* and *C. B. Bird.*

WINSLOW, J. The plaintiff sold to Leahy & Beebe a quantity of standing pine, with the right to cut and manufacture the same, but reserving title to the logs and lumber manufactured therefrom until the purchase price was fully paid. Leahy & Beebe cut the pine, marked it with their own mark, banked it on Tamarack river, and sold a part of it to the defendant *Curtis Bros. & Co.*, under a written contract that they (Leahy & Beebe) should manufacture it into lumber and pile it as directed by *Curtis Bros. & Co.* This was done, and the same was delivered and fully paid for by the defendants; but it appears that Leahy & Beebe had never fully paid the plaintiff for the pine, and the plaintiff therefore claims to recover of the defendants the value of the lumber, on the ground that title had never passed to Leahy & Beebe. The defendants claim that the plaintiff was estopped from enforcing his reserved title as against them, and the question whether such an estoppel was shown by the evidence was the question sharply litigated upon the trial.

The legal principles applicable to the question litigated have been so recently discussed and stated in the case of *Mississippi River L. Co. v. Miller*, *ante*, p. 77, that it is unnecessary to repeat them here. The facts relied upon to prove an estoppel in that case were almost identical with the facts found by the jury in the present case, except that it appears more clearly in the present case that the plaintiff contemplated that his vendee was to manufacture the logs and sell the lumber therefrom than it did in the case cited. Within the principles there stated, an estoppel clearly appears in the present case, upon the facts found by the

jury. Such being the case, the only questions to be considered are whether prejudicial errors occurred upon the trial.

It is claimed that it was error to exclude evidence showing that the contract of sale made by *Stubbings* to Leahy & Beebe was filed in the office of the city clerk at Wausau. As this was a contract for the sale of real estate, it was not entitled to be filed. Such filing, if made, was an act which protected no legal right and constituted no notice to any one; and, as there was no proof that any of the defendants had actual knowledge of the fact, it seems clear that the proof offered was immaterial.

One Cline, the foreman of Leahy & Beebe's mill, was examined by the defendants, and gave testimony as to the sale of the lumber to *Curtis*, and also as to a conversation with the plaintiff at Wausau while *Curtis* was removing the lumber, in which he told *Stubbings* of the sale to *Curtis*. Upon cross-examination the plaintiff endeavored to prove by the witness certain letters which passed between him and the plaintiff as to the amount of timber remaining uncut on the *Stubbings* lands in the fall of 1890. Upon objection the letters were ruled out as not proper cross-examination. This ruling seems to have been strictly correct. The witness was not a party to the action, and the cross-examination attempted did not relate to matters gone into on direct examination. *Sullivan v. Collins*, 107 Wis. 291. Furthermore, the letters were all introduced in evidence by the plaintiff later in the trial.

A large number of instructions were asked by the plaintiff and refused, but we are relieved from any examination of them because no exceptions to the refusal are preserved in the bill of exceptions. While some exceptions were taken to certain instructions which were given, we have discovered none which was erroneous or deserves detailed discussion.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

THE STATE EX REL. JOINT SCHOOL DISTRICT NO. 8 OF THE TOWNS OF AMHERST AND SCANDINAVIA, Appellant, vs. JOINT SCHOOL DISTRICT NO. 1 OF THE TOWNS OF AMHERST AND LANARK and another, Respondents.

February 6 — February 26, 1901.

Joint school districts: Division of property on creation of new district: Parties to the determination.

Where territory in the town of A. is taken from a joint school district comprising territory in A. and L. to form part of a new joint district in A. and S., the supervisors of A. and L. are the only persons who, under sec. 420, Stats. 1898, have the right to participate in determining the amount which the old joint district should pay to the new one by reason of retaining the property; and a determination of that question by the supervisors of A. and S. is a nullity.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

Mandamus proceeding to compel the clerk of *Joint School District No. 1 of the Towns of Amherst and Lanark* to certify to the town clerks of such towns the proper proportions of $60.75 to be raised by taxation of property in said *Joint School District No. 1* of said towns, which sum, it was alleged, had theretofore been lawfully awarded to *Joint School District No. 8 of the Towns of Amherst and Scandinavia* to be paid by said *Joint School District No. 1*, because of the creation of the former district in part from territory of the latter located in said town of Amherst. Issue was joined as to whether *Joint School District No. 8* was legally created. and as to whether $60.75 was at the time of such creation lawfully apportioned to defendant to pay to said *District No. 8.*

It appears by the proofs that on June 16, 1898, the supervisors of the towns of Amherst, Scandinavia, and Lanark assembled to consider a proposition to establish a new joint school district to be known as *Joint School District No. 8*

of the Towns of Amherst and Scandinavia. A joint school district had existed, known as *Joint School District No. 1*, comprising territory in the towns of Amherst and Lanark, and it was proposed to change that by taking territory therefrom in the town of Amherst for the new district. That was the reason why the supervisors of the town of Lanark took no part in the proceedings. The school-house of said *Joint School District No. 1* was located in that part of such district within the boundaries of the town of Lanark. The proposition to form the new district was decided favorably thereto, and the supervisors met on September 17, 1898, to determine the value of the property belonging to *District No. 1* and the part thereof which such district should pay to the new district, pursuant to sec. 420, Stats. 1898, on account of the territory taken for the latter from the former. Before a conclusion was reached the meeting adjourned to September 24, 1898. On that day the supervisors of the towns of Amherst and Scandinavia determined that the amount of money which the old district should pay to the new district was $60.75, but the supervisors of the town of Lanark refused to consent thereto or to certify such determination to the old district. Upon the decision being reached as aforesaid by the supervisors of the towns of Amherst and Scandinavia, they caused a notice to be made out, addressed to the clerk of said *District No. 1*, to the effect that a new district had been established in part from territory taken from said *District No. 1*, and that the latter was indebted to the former to the amount of $60.75, as its share of the school district property retained by the old district, and that said sum should be raised by a tax upon the property of said district for the benefit of the new district. The supervisors of the town of Lanark refused to sign said notice because the sum of $60.75 was excessive, but they offered to pay the sum of $24.50. The notice was delivered to the clerk of the old district, but he refused to certify to the

clerks of the towns of Lanark and Amherst their respective shares to be raised by taxation upon the property in their respective towns comprising *Joint School District No. 1.*

On such facts the court decided that the order to the clerk of *Joint School District No. 1* was void and that defendant was entitled to have the alternative writ of *mandamus* quashed and to have judgment for costs. The cause was so disposed of, judgment being rendered in favor of defendant.

For the appellant the cause was submitted on the brief of *Cate, Lamoreux & Park.*

For the respondents there was a brief by *E. L. & E. E. Browne*, and oral argument by *E. E. Browne.*

MARSHALL, J. It seems clear that the only persons who had any right to participate in determining the amount of money *School District No. 1 of the Towns of Amherst and Lanark* should pay to the new joint school district by reason of retaining the school-house and other school district property, were the supervisors of those two towns. The matter did not concern the town of Scandinavia at all. It had no interest in the property of the old district. Whatever was to come from such district was to be in money and be credited by it to that part thereof located in the town of Amherst which was taken from the old district, and was to be raised, in part, by taxation of that part of the old district remaining in the town of Amherst. Clearly, the town of Scandinavia, under sec. 420, Stats. 1898, was a stranger to the proceedings to determine the amount to be paid by the old district as much as if it were not concerned in such district at all. The supervisors of Amherst and Lanark, under such section, constituted the board upon which was imposed the duty of valuing the property of *School District No. 1*, and the amount justly due from it to the new creation. The determination of that question by

the supervisors of the towns of Amherst and Scandinavia was a nullity, and therefore it did not furnish a legitimate basis for the clerk of the old district to certify to the town clerks of Amherst and Lanark the amount to be raised by taxation upon the property of their respective towns composing the old district, for the benefit of the new one. It follows that there was no failure on the part of such clerk to perform an official duty, rendering him liable in *mandamus* proceedings. *State ex rel. Bement v. Rice*, 35 Wis. 178.

By the Court.— The judgment is affirmed.

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109 316
s53 LRA 644
s56 LRA 829n
56 LRA 830n
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115 286
116 47
60 LRA 411

WALLACE, Respondent, vs. PERELES, imp., Appellant.

February 7 — February 26, 1901.

Husband and wife: Presumption of continuance of coverture: Conveyance by husband to wife: Covenants: Paramount title: Eviction: Judgment, when binding on covenantor: Notice.

1. Coverture once shown is presumed to continue.
2. Prior to the enactment of ch. 86, Laws of 1895, an absolute conveyance of real property from a husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate, and the burden of proof is upon the party alleging that it was so purchased.
3. Covenants run only with the legal title to lands and tenements.
4. Where a grantor of land has no title and no possession, and his grantee does not take immediate possession, the covenants of the grantor are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. [Whether entry by the grantee into possession of the land immediately after delivery of the deed would be sufficient to carry the covenants, not determined.]
5. A judgment establishing a paramount right to land as against the person in possession claiming title under a warranty deed is not *prima facie* evidence of the existence of a paramount title, or of eviction thereby, as against the defendant's covenantor, who was not a party to the action and to whom no notice of it was given until after rendition of the judgment.

APPEAL from a judgment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

On June 27, 1879, one Andrew Argus and wife deeded the west twenty-four feet of lot 8, block 7, of Millard & Taft's addition to the city of New London, except the north ten feet thereof, to defendant. On March 29, 1889, the defendant and his wife, by deed with full covenants of warranty, conveyed the entire west twenty-four feet of said lot 8 to Frederick Eckert. On February 10, 1891, Eckert quitclaimed said last-described tract to his wife, Minnie. Thereafter Mrs. Eckert deeded by warranty deed to Henrietta Sager, and she to the plaintiff. On June 24, 1895, plaintiff deeded to one Fred Poppe. All of said deeds included the north ten feet of the west twenty-four feet of lot 8, excepted from the deed from Argus to defendant, and to which the latter had no title and no possession. In 1896 one Hannah E. Patchin commenced an action against Fred Poppe, claiming that said north ten feet was an alley appurtenant to her property, which was being obstructed by Poppe. Judgment in her favor was entered, and Poppe was evicted therefrom. Thereafter Poppe brought suit against plaintiff on the covenants of his deed. The suit was commenced July 19, 1897, and August 30, 1897, plaintiff served upon defendant a notice in writing of the pendency of said suit, with a copy of the pleadings and a demand to defend. The defendant made no defense, and judgment was entered in favor of Poppe and against plaintiff for $490.95 damages and costs. Thereupon this action was commenced, based upon the covenants in his deed to Eckert, to recover from defendant the amount of said Poppe judgment.

A jury was waived. In addition to the facts above stated, the court found that the deed from Eckert to his wife was based upon "a valuable consideration, or other good and sufficient consideration," and that plaintiff served due and timely notice upon defendant, and tendered him the defense

of the action of Poppe against *Wallace, Jr.*, before the time for answering had expired. Evidence was offered by defendant that he was never in possession of the disputed ten feet. The court refused to find on that subject, and refused to find that Frederick Eckert and Minnie Eckert were, and still are, husband and wife, and that Mrs. Eckert did not pay the consideration for the deed to her out of her separate estate. Judgment was entered for plaintiff for $554.15 damages and costs, against the defendant *J. M. Pereles*, from which this appeal is taken.

For the appellant there were briefs by *Nath. Pereles & Sons*, and oral argument by *C. F. Hunter*.

For the respondent there was a brief by *Guernsey & Lehr*, attorneys, and *Barbers & Beglinger*, of counsel, and oral argument by *J. E. Lehr* and *Fred. Beglinger*. They contended, *inter alia*, that Mrs. Eckert had the entire beneficial interest in the land, under the deed from her husband, leaving the husband nothing but the shadow of the legal title. This title of Mrs. Eckert was good against everyone except her husband's creditors and she could in equity have compelled him to convey to her the legal title. No creditors of Frederick Eckert had ever questioned this title, and Mrs. Eckert had transmitted her interest and the land itself by warranty deed to others, until Poppe finally derived title and went into possession of the whole land relying on Mrs. Eckert's title and the record of the warranty contained in defendant's deed. This for all purposes of the case made Mrs. Eckert and her successors in the title the real, substantial owners of the land. *Putnam v. Bicknell*, 18 Wis. 333, 336; *Hannan v. Oxley*, 23 Wis. 519, 523; 1 Jones, Real Prop. §§ 45, 46. The covenant in defendant's deed inured to the owner of the real, substantial title to the land. Mr. Eckert having parted with his interest in the land, cannot sue on this covenant, but the real owner can, because such actions must be brought in the name of the real party in interest.

To require first a suit in equity to compel the transfer of the legal title and then a suit on the covenant, would be a sacrifice of substance to mere empty form not required by modern procedure. *Martin v. Scofield*, 41 Wis. 167; *Price v. Osborn*, 34 Wis. 34. See, also, *Mygatt v. Coe*, 142 N. Y. 89, and cases cited; *Thornton v. Court*, 3 De Gex, M. & G. 293; *White v. Whitney*, 3 Met. 87; *Town v. Needham*, 3 Paige, 546; *Andrews v. Wolcott*, 16 Barb. 25. The reason of the old rule that covenants only run with the legal title evidently was to protect the covenantor against a multiplicity of suits brought by persons having no title to the land which would give them a real, substantial interest or which might prevail against the owner of the legal title. But where the person suing on the covenant is shown to have been the real owner of the land as in this case, the reason and spirit of the old rule is manifestly satisfied. And this is not inconsistent with anything decided in *Wright v. Sperry*, 21 Wis. 336. See Rawle, Covenants (4th ed.), 345, and cases cited; *Harper v. Perry*, 28 Iowa, 58.

BARDEEN, J. Questions of law only are involved on this appeal. They group themselves under the following heads: (1) The conveyance from Eckert to his wife passed only an equitable title. Covenants real run only with the legal title, and cannot be enforced by her grantees against defendant. (2) Neither title nor possession being shown in defendant at the time of his conveyance, the covenants in his deed were personal to his grantee, and did not pass by a mere conveyance of the land. (3) No eviction under paramount title having been shown, the recovery, if any, must be limited to nominal damages.

1. The evidence is undisputed that at the date of the deed from Frederick Eckert to Minnie Eckert the parties were husband and wife. Coverture once shown is presumed to continue. Jones, Ev. § 54. Under the evidence the court

should have found that they were, and still are, man and wife. Prior to the passage of ch. 86, Laws of 1895, an absolute conveyance of real property from the husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate. *Putnam v. Bicknell*, 18 Wis. 333; *Kinney v. Dexter*, 81 Wis. 80. Where, however, the transaction related to her separate estate, the marriage relation was disregarded, except where the question of fraud arose, and then it was considered and more closely scrutinized on account of the great inducements and facilities afforded for the commission of fraud. *Beard v. Dedolph*, 29 Wis. 136. See *Fenelon v. Hogoboom*, 31 Wis. 172. In *Kinney v. Dexter*, *supra*, the action was ejectment. The plaintiff claimed title by successive deeds after a deed from one Brown to his wife. The latter deed was a mere gift, and the court held that it gave the wife only an equitable title to the land, which would not support ejectment. In contests which have arisen involving transactions between husband and wife, a rule of great strictness has been adopted by this court as to the burden of proof. Where the rights of creditors are involved, before the wife can recover she must show by clear and satisfactory evidence that her purchase from her husband was made in good faith and for a valuable consideration paid out of her separate estate, or by a third person for her; and the same rule applies to one who took from the wife with notice. In such case a mere recital of a valuable consideration in the conveyance from husband to wife will not support a recovery in her favor. *Horton v. Dewey*, 53 Wis. 410; *Gettelmann v. Gitz*, 78 Wis. 439; *Rozek v. Redzinski*, 87 Wis. 525. In *Carpenter v. Tatro*, 36 Wis. 297, the suit was by the wife against her divorced husband upon a claim assigned to her by her second husband. She testified that she paid $5 therefor, but did not show she had any separate estate. A

judgment in her favor was reversed, and the court said: "If the plaintiff had no separate estate, the assignment and transfer of the debt by the husband to her does not vest the legal title in her. She could not receive it as a gift from him, as she might from any person other than her husband, and enforce its collection by action upon it. And until it appeared that she had a separate estate, with which she purchased the claim, the evidence of the assignment should have been excluded."

If Mrs. Eckert had been evicted, and had brought an action against defendant upon the covenants in the deed, she could not have prevailed in such action, under the authorities cited, without showing that she purchased the property out of her separate estate. In what better position are her grantees? She obtained but an equitable title to the land. That title passed to her grantees, and no one is here questioning it. Her grantees, however, are seeking to give it the force and effect of a legal title, and insist that it can only be questioned by creditors of the husband, or others wronged by the conveyance. But that is not the real question at issue. No one is seeking to impeach the actual title conveyed. The real question is whether a right of action in plaintiff can be traced through a chain of conveyances, one of which conveys only an equitable estate. Under the facts and law as stated, the legal title stopped in Mr. Eckert. In *Wright v. Sperry*, 21 Wis. 331, 334, this court said: "It is a general principle that covenants run only with the legal title to lands and tenements. *Beardsley v. Knight*, 4 Vt. 471; *Randolph's Adm'x v. Kinney*, 3 Rand. (Va.), 396; *Watson v. Blaine*, 12 Serg. & R. 131; *Allen v. Wooley*, 1 Blackf. 149; 1 Smith, Lead. Cas. 121." This case was decided at a time when a mortgage in this state carried the fee, and it was held that, as the assignment of the several mortgages was informal, the legal title to the land did not pass to the assignee so that he could have the benefit of the covenants of

warranty. The rule is somewhat ancient and technical, but it passed into the jurisprudence of this state at an early day and has stood unchallenged ever since. The weight of authority against it is not so great that we feel impelled to depart therefrom. See *McGoodwin v. Stephenson*, 11 B. Mon. 21; *Mayor, etc., of Carlisle v. Blamire*, 8 East, 487.

2. Under this head it is urged that, no title or possession having been shown in the defendant or his grantee, there was no such privity of estate as would carry the covenants to subsequent purchasers. Although the court refused so to find, the evidence is undisputed that defendant was never in possession of the north ten feet of the west twenty-four feet of lot 8. His deed from Argus expressly excepted this tract, but it was included in defendant's deed to Eckert. There is no proof that Eckert ever took actual possession of the disputed tract, or that any subsequent grantee ever did until the land came to Poppe. In absence of proof, the presumption is that possession follows ownership. *Mygatt v. Coe*, 147 N. Y. 456. The rule is universal that, in order to carry the covenants in a deed to subsequent grantees, there must be actual or constructive seisin. In absence of both right and possession, all the elements which constitute an estate are necessarily wanting, and the covenants contained in the grant must remain in the grantee, from the absence of everything which can carry them farther. 1 Smith, Lead. Cas. (8th ed.), 205, and cases cited.

In New York the rule is thus stated: "Privity of estate is essential to carry covenants of warranty and quiet enjoyment to subsequent grantees in order to support a right of action by them against the original covenantor when there has been an eviction by paramount title." *Mygatt v. Coe*, 147 N. Y. 456; *S. C.* 152 N. Y. 457. In a note to *Spencer's Case*, 1 Smith, Lead. Cas. (9th Am. ed.), 224, is is said: "If any estate passes from the grantor to the grantee in a conveyance, it is enough to carry covenants. But if the title of

the grantor wholly fails, so that no title to the land passes to the grantee, with which the covenants can run, the grantee can take no advantage of them." The following cases are cited to support the text: *Slater v. Rawson*, 1 Met. 450, 6 Met. 439; *Beardsley v. Knight*, 4 Vt. 471; *Devore v. Sunderland*, 17 Ohio, 52; *Martin v. Gordon*, 24 Ga. 533; *Burtners v. Keran*, 24 Grat. 42; *Allen v. Greene*, 19 Ala. 34. The general rule is that the covenant of a stranger to the title is personal to the covenantee, and is incapable of transmission by a mere conveyance of the land. *Mygatt v. Coe*, 152 N. Y. 457–466.

In *Nichol v. Alexander*, 28 Wis. 118, this court held that if a grantor, by full-covenant deed of warranty, assumes to convey unoccupied lands to which he has no title, there is at once a constructive eviction of the grantee, which entitles him to the same remedies that he would be entitled to had he been turned out of the actual possession of the land by legal process. The rule has been reasserted and approved in subsequent cases. *McInnis v. Lyman*, 62 Wis. 191; *McLennan v. Prentice*, 77 Wis. 124. We do not see how the rule would be different if the grantor conveyed lands to which he had no title, if they were in the possession of the actual owner. A cause of action arises as soon as the deed was delivered, and was not assigned or transmitted to subsequent grantees by a mere conveyance of the land. We therefore hold that where the record shows that the grantor had no title and no possession, and there is no proof that the grantee took possession, the covenants of the grantor are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. Whether, if the defendant's grantee entered into the immediate possession of the land after delivery of the deed, that fact would be sufficient to carry the covenants, is a matter of some doubt. There are respectable authorities upon both sides of the question, but, it not being fairly in this case, we leave it for future consideration.

3. The proof regarding eviction by paramount title is as follows: Mrs. Patchin commenced an action against Poppe, claiming a paramount right to the disputed tract. No notice of this suit was given defendant until long after judgment had been rendered. Poppe then brought suit against plaintiff on the covenants of his deed. Notice of this suit, with a demand to defend, was served upon defendant forty-two days after its commencement, which the court finds was "before the time for answering had expired." This finding is excepted to, and there is no evidence in the record to support it, except the inference arising from the fact that plaintiff's answer in that action was verified after the date of the service of notice upon defendant. This evidence is of doubtful value in respect to the question whether the notice was timely or not. But this is not a matter of importance in this case. It is conceded that defendant had no notice of the Patchin judgment until after its rendition. Certainly he was not bound by it. If otherwise entitled to recover, notice to defendant of the former action was not necessary to plaintiff's right to recover in this action. Rawle, Covenants, § 124. Where, however, it is sought to bind a covenantor by notice, as said in *Somers v. Schmidt*, 24 Wis. 417, it must be from the covenantee, in time to answer and defend, and perhaps accompanied by a request to defend. See *Eaton v. Lyman*, 26 Wis. 61; *S. C.* 33 Wis. 34; *Saveland v. Green*, 36 Wis. 612. The complaint in *Poppe v. Wallace, Jr.* alleged that the latter had due notice of the Patchin suit and was tendered its defense, and such allegation is found to be true in the findings. Hence, if defendant had appeared in that suit, he would have been met by proof of a judgment of paramount title, final and conclusive against the plaintiff. Of this judgment defendant had no notice, and he was not bound by it. In this case the only evidence of paramount title and eviction was the two judgment rolls in the cases before mentioned. As bearing upon the probative force of

the Patchin judgment as against defendant, we quote the following from 2 Devlin, Deeds, § 937: "There has been some discussion, resulting in a variance of opinion, as to what effect a judgment possesses when the covenantor has not been notified of the suit and was not requested to defend. Of course, such a judgment cannot bind the covenantor. It has been asserted that, although the defendant might inquire into the merits of the judgment, yet it was *prima facie* evidence of the existence of a paramount title. But the more reasonable rule, and the one sustained by authority, is that the judgment, when no notice has been given and the covenantor is not a party to the suit, is not even *prima facie* evidence that the eviction was founded upon an adverse and paramount title." The number of cases cited to sustain the author's conclusion would seem to indicate that it was very well grounded. At most the judgment in the Poppe case would only be binding upon defendant as to the amount of the recovery, and of that there may be some doubt.

Adopting the rule that the Patchin judgment was not *prima facie* evidence against the defendant of the existence of a paramount title, or of eviction thereby, we find nothing in the record to support the judgment. The rule is well stated in Rawle, Covenants (4th ed.), 150, thus: "And in all cases it must be borne in mind that, if the purchaser choose to retire before the paramount title, it is at his own risk; and in the suit against his covenantor he must assume the burden of proof, and make out the adverse title to which he has yielded with as much particularity as if he were suing in ejectment, unless, of course, the adverse right of possession has been established by a judgment or decree in a suit of which the covenantor has been properly notified, in which case the burden of proof will not only be removed, but the judgment or decree will be conclusive evidence of the validity of the paramount title."

So, upon all the grounds mentioned, the right of plaintiff to recover is defeated. It is but proper to say that the second and third questions herein considered do not appear to have been urged before the trial court.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment for defendant.

On April 30, 1901, the mandate was modified so as to read as follows: The judgment is reversed, and cause is remanded with direction to enter judgment for defendant, unless the trial court, upon notice and application, in its discretion and upon such terms as may be just, grants a new trial of the action.

LINDE, Appellant, vs. GUDDEN, Respondent.

February 7 — February 26, 1901.

Deeds: Execution: Evidence.

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1. To justify a finding against the execution, according to its terms, of a formal conveyance, duly acknowledged, the evidence must be perfectly clear, convincing, and satisfactory, establishing the fact beyond all reasonable controversy.
2. The testimony of a party to a deed, who would overturn it, that she did not execute it, is insufficient to overcome the force of apparent execution and of the official certificate of acknowledgment, even though there is other testimony tending to show that her signature was not upon the instrument at the time it was subscribed by the witnesses, some days prior to the date of the acknowledgment.

APPEAL from a judment of the circuit court for Waupaca county: CHAS. M. WEBB, Circuit Judge. *Reversed.*

Appeal by plaintiff from judgment for defendant in an action of ejectment for a farm of seventy-nine acres in Winnebago county, formerly belonging to W. Gudden, the father of plaintiff and husband of defendant, to whom he was mar-

ried late in life, in 1880, at which time she turned over to him $3,200 in money, and he agreed, as defendant claims, that the same should be returned to her and she should have the farm and all personal property thereon, excepting Gudden's library, for her life.. On January 6, 1887, he and the defendant executed a deed to plaintiff and her brother, B. C. Gudden, reserving to defendant a life estate in the farm, and charging upon the grantees an annual payment of $180 per annum to defendant during her life. The claim of the plaintiff was predicated on an alleged deed bearing date May 1, 1889, for the expressed consideration of $3,000, from William Gudden and the defendant to plaintiff and her said brother, absolutely conveying the farm in question, warranting title, and, in addition, containing the following declaration:

"This deed is given to annul a former deed made out January 6, 1887, by Mr. Th. Frentz. The conditions therein mentioned were based on a marriage contract between *Anna Zweifel*, now *Anna Gudden*, and Wm. Gudden.

"With this instrument are all stipulations and agreements made by first parties, and also obligations by second parties in deed of January 6, 1887, revoked and renounced."

Defendant denied execution of this deed. The action was tried to the court without a jury, and the court found as a fact that the latter deed was never executed or delivered by the defendant, *Anna Gudden*, and is not her deed. William Gudden died in 1898. B. C. Gudden conveyed all his interest to plaintiff.

For the appellant there was a brief by *Hume, Oellerich & Jackson*, and oral argument by *J. W. Hume*.

For the respondent there was a brief by *Barbers & Beglinger*, and oral argument by *Charles Barber* and *Fred. Beglinger*.

DODGE, J. No rule is more firmly established in this state than that, to justify a finding against the execution, according to its terms, of a formal conveyance, duly acknowledged,

the evidence must be perfectly clear, convincing, and satisfactory; that the defense must be established beyond all reasonable controversy,—indeed, as some authorities put it, beyond a reasonable doubt. *Kercheval v. Doty*, 31 Wis. 476, 491; *Harter v. Christoph*, 32 Wis. 245, 248; *Smith v. Allis*, 52 Wis. 337, 345; *German Bank v. Muth*, 96 Wis. 342, 345; *Fillingham v. Nichols*, 108 Wis. 49. True, most, if not all, of these cases are addressed to denial of the correctness of the substance of the conveyances, but the reasons for demanding at least as much, if not more, certainty of proof to overcome the apparent fact of the execution of a conveyance are even greater; for, if the paper were neither signed nor acknowledged by the ostensible grantor, then, apparently, two crimes have been committed,—the crime of forgery by whoever wrote the name, and the crime of false certification by the acknowledging officer. The presumption of innocence is always a most cogent and persuasive one, not to be overcome by any evidence short of substantial certainty.

An examination of the record in this case discloses a document purporting to be signed by the respondent, her signature sufficiently similar to other admitted signatures to lead several bankers and other experts to believe in its authenticity. Her acknowledgment thereof is certified by a magistrate now dead. The fact that respondent signed is also supported by the direct testimony of two witnesses, more or less interested, it is true. On the other hand, it is denied by herself on oath, upon the trial. That denial is in some degree confirmed by the testimony of one of the witnesses to the deed, Mischke, who puts himself in conflict with Clarissa Linde and B. C. Gudden as to whether respondent's name was on the deed at the time he signed as a witness. He does not, however, pretend to testify that it was not placed there at some subsequent date, before the acknowledgment, which did not take place until five days

after the date of the instrument. His testimony, therefore, is inconclusive upon the main question whether she executed it at all and whether she acknowledged it.

It is urged that there was no reason or consideration for the execution of the deed, but this position is not tenable. We cannot avoid the conclusion that by her previous deed respondent had released any liability of her husband to her for the principal of the money which she had placed in his hands, and had accepted in lieu thereof an agreement to pay her $180 per annum through her life. By this deed she apparently was to receive substantially the principal of that sum, and did receive it in the form of two mortgages delivered to her at about that time, and subsequently assigned to her by her husband.

In the view of this evidence, it might be thought a fairly debatable question whether respondent's name was signed to the deed at the time when it was subscribed by the witnesses,—a question upon which the finding of the court below perhaps ought not to be disturbed; but upon the crucial question, whether at any time she affixed her signature thereto, the deed itself and its certificate of acknowledgment stand undenied, save by the testimony of the respondent herself. It has been held in many cases, and is strongly intimated by some of those above cited, that in no case can the testimony of the party who would overturn a deed alone overcome the force of apparent execution and of the official certificate. *Howland v. Blake*, 97 U. S. 624, 627; *Johnson v. Van Velsor*, 43 Mich. 208, 219; *Smith v. McGuire*, 67 Ala. 34; *Blackman v. Hawks*, 89 Ill. 512, 514; *Warrick v. Hull*, 102 Ill. 280, 283; *Sassenberg v. Huseman*, 182 Ill. 341, 349. In deference to the rules of evidence thus established, we cannot yield to the conclusion of the circuit court that respondent did not execute this deed. We are forced to the view that he could have made that finding only by ignoring those rules of evidence, and decid-

ing the question before him as he would any other, upon the mere preponderance of evidence as it appeared to him, and not because he was convinced beyond reasonable controversy. The evidence does not warrant that degree of certainty that respondent did not at some time, on or before May 6, 1889, sign, and on that day acknowledge, the deed in question. Hence the document itself, with the magistrate's certificate of acknowledgment, establishes its own authenticity. That deed, with other conveyances in evidence, makes complete fee-simple title in the plaintiff, and leaves no right of possession in defendant. The judgment, therefore, should have been in favor of plaintiff.

By the Court.—Judgment reversed, and cause remanded with directions to enter judgment in accordance with the prayer of the complaint.

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JUNEAU COUNTY, Plaintiff in error, vs. WOOD COUNTY, Deendant in error.

February 7—February 26, 1901.

Poor laws: Aid from soldiers' relief fund: Settlement.

While receiving aid from a county, acting under the county system for the relief of the poor, out of the "soldiers' relief fund" provided for by secs. 1529*a*–1529*i*, Stats. 1898, the recipient is precluded from gaining a settlement in the county by subd. 4, sec. 1500, providing that "no residence of a person in any town while supported therein as a pauper shall operate to give such person a settlement in such town."

ERROR to review a judgment of the circuit court for Wood county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

J. T. Dithmar, attorney, and *H. W. Barney*, of counsel, for the plaintiff in error.

H. Wipperman, for the defendant in error.

CASSODAY, C. J. This writ is brought to reverse a judgment based upon findings on the trial of an appeal from the disallowance, by the county board, of the claim of *Juneau County* against *Wood County* for the support of a pauper and his family. The findings are to the effect that one Charles Spies and family resided in Marathon county from November 1, 1892, to April 1, 1894, and during that time were self-supporting; that at the last-named date they moved to *Wood County*, and received aid from that county through its poor commissioners, "as poor and indigent persons," July 1, August 6, and September 11 and 24, 1894, and December 21, 1895, and February 8, April 30, and May 2 and 29, 1896; that Charles Spies was an honorably discharged soldier of the late war of the Rebellion, and received aid from *Wood County* "as a poor and indigent person" in December, 1894, and January, February, March, and April, 1895, "out of the soldiers' relief fund" of that county; that Spies and family left *Wood County* and went to *Juneau County*, July 10, 1896, and have resided in *Juneau County* ever since that time, and in July, August, November, and December, 1896, and January, February, March, April, May, and June, 1897, *Juneau County* furnished aid for Spies and his family, as poor and indigent persons, to the amount of $73; that both *Wood* and *Juneau Counties* were, during such times, under the county system for the support of the poor. And, as conclusions of law, the court found, in effect, that Charles Spies and family, from July 1, 1894, to May 29, 1896, were supported in and by *Wood County* as paupers; that neither Charles Spies nor any of his family has a settlement in *Wood County;* that judgment be rendered in favor of *Wood County* and against *Juneau County* for the costs and disbursements of this action; and ordered judgment to be entered accordingly. To reverse that judgment, *Juneau County* sued out this writ of error.

It is conceded that neither Spies nor any of his family had

a settlement in *Wood County* on or prior to September 24, 1894. The statute provides that "every person of full age who shall have resided in any town in this state one whole year shall thereby gain a settlement in such town; but no residence of a person in any town while supported therein as a pauper shall operate to give such person a settlement in such town." Subd. 4, sec. 1500, Stats. 1898. The contention on the part of *Juneau County* is that Spies and his family were not precluded by the statute quoted from gaining a settlement in *Wood County* merely by reason of the fact that between September 24, 1894, and December 21, 1895, they received aid out of the soldiers' relief fund of *Wood County* in each of five different months. During that period, which was for more than a year, it is conceded that they received no aid from any other fund. The decision in this case necessarily turns upon the determination of the question whether such contention is correct.

Both counties were, during the times in question, acting under the county system. Secs. 1517–1529, Stats. 1898. One of these sections provides that "when any county shall have abolished the distinction between county and town poor the powers conferred and duties imposed by this chapter on town supervisors, as officers of the poor, shall be exercised by the county superintendents of the poor in such county, if there be any, and if there be none, then by such officers or agents as shall be appointed by the county board therefor; otherwise by such board." Sec. 1524. That section further provides "that temporary aid shall be given, granted, furnished and provided to and for all honorably discharged indigent Union soldiers, sailors and marines, and the indigent wives, widows and minor children of indigent or deceased honorably discharged Union soldiers, sailors or marines, without requiring the removal of any such person to any poorhouse," etc. The statutes also make special provisions for the "relief of soldiers, sailors and marines." Secs. 1529*a*–

1529*i*. One of these sections provides for the annual levy and collection of a tax "for the purpose of creating a fund for the relief of needy Union soldiers, sailors or marines, the indigent wives, widows, minor children of deceased Union soldiers, sailors and marines, and the indigent parents of such soldiers, sailors or marines," etc. Sec. 1529*b*. The next section requires a "written report to the county board . . . of all resident indigent persons of the classes mentioned." Sec. 1529*c*, as amended by ch. 231, Laws of 1899. It will be observed that, to entitle any person to such relief, he must be "needy" or "indigent." The language is similar to the statutes for the "relief and support of the poor," where, with certain exceptions, relief and support are only to be given to "poor and *indigent* persons" who "shall stand in *need* thereof"—"poor" persons. Secs. 1499–1516, Stats. 1898. As stated by Mr. Justice PINNEY: "The word *poor* in the statute has a restricted and technical meaning, and it is practically synonymous with 'destitute,' denoting extreme want and helplessness." *Rhine v. Sheboygan*, 82 Wis. 354; *Ettrick v. Bangor*, 84 Wis. 259; *Wisconsin K. I. Co. v. Milwaukee Co.* 95 Wis. 158. Webster defines the word "indigent" as a person "destitute of property or means of comfortable subsistence; needy; poor." Other dictionaries define it in substantially the same way. So Webster defines "needy" as a person "distressed by want of the means of living; very poor; indigent; necessitous." Others give similar definitions.

The trial court was clearly right in finding that Spies and his family received aid out of the soldiers' relief fund, "as poor and indigent persons." Upon no other theory, in our judgment, could such taxation for supplying such fund be sustained. In the case last cited we were compelled to hold an act of the legislature unconstitutional which provided that habitual drunkards who were "pecuniarily unable to procure and pay for treatment for such disease" might be

treated for such disease at the expense of the county. That decision was based upon the theory that such legislation was not a legitimate exercise of the police powers of the state, but was an imposition of a tax upon the county, without its consent, for the benefit of private parties. Much that is there said would be applicable to the sections of the statutes in question, were they to be construed as claimed by counsel for *Juneau County*. The reasoning of that case need not be here repeated. See also *Wisconsin Industrial School v. Clark Co.* 103 Wis. 651, 666.

By the Court.—The judgment of the circuit court is affirmed.

UNDERWOOD and another, Respondents, vs. SMITH and another, Appellants.

February 7—February 26, 1901.

Public lands: Surveys: "Corners:" "Boundary lines:" Meandered lake: "Due east and west."

1. The meander line of a lake as shown on the government survey is not a "boundary line;" nor is a meander post at the intersection of the meander line and section line a "corner;" nor is the distance between the meander post and the nearest corner the "length of a boundary line," within the meaning of the provisions of sec. 2396, R. S. of U. S., that "all corners marked in the survey . . . shall be established as the proper corners," which they are intended to designate, and that "the boundary lines actually run and marked . . . shall be established as the boundary lines . . . and the length of such lines, as returned, shall be held and considered as the true length thereof."
2. Where a fractional quarter quarter section is represented on the government survey as extending to a meandered lake, the lake itself and not the meander line is the boundary if the lake is within that subdivision; otherwise the boundary is the next line which divides quarter quarter sections.
3. Under the provision of sec. 2396, R. S. of U. S., that "boundary lines which have not been actually run and marked shall be ascertained

by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west, as the case may be, to the watercourse . . . or other external boundary of such fractional township," — "due east and west" means a mean course between the north and south boundaries of the section, where such boundaries are ascertained and fixed.

APPEAL from a judgment of the circuit court for Portage county: CHAS. M. WEBB, Circuit Judge. *Affirmed.*

This is an action to recover the stumpage value of a quantity of timber cut by the defendants. The action was tried by the court, and the facts were not materially in dispute. The plaintiffs owned the N. E. ¼ of the S. E. ¼ of section 6, town 9, range 12, in Forest county, Wisconsin, the same being a fractional quarter section, as it appears upon the government map, and named "Lot 4." The defendants cut a quantity of timber upon land which is claimed by the plaintiffs to be a part of said lot 4, but which is claimed by the defendants to be a part of the S. E. ¼ of the S. E. ¼ of said section 6. Whether the land on which the timber was cut was a part of lot 4, or was a part of the S. E. ¼ of the S. E. ¼, was the question in controversy. There was no dispute as to the amount or value of the timber cut.

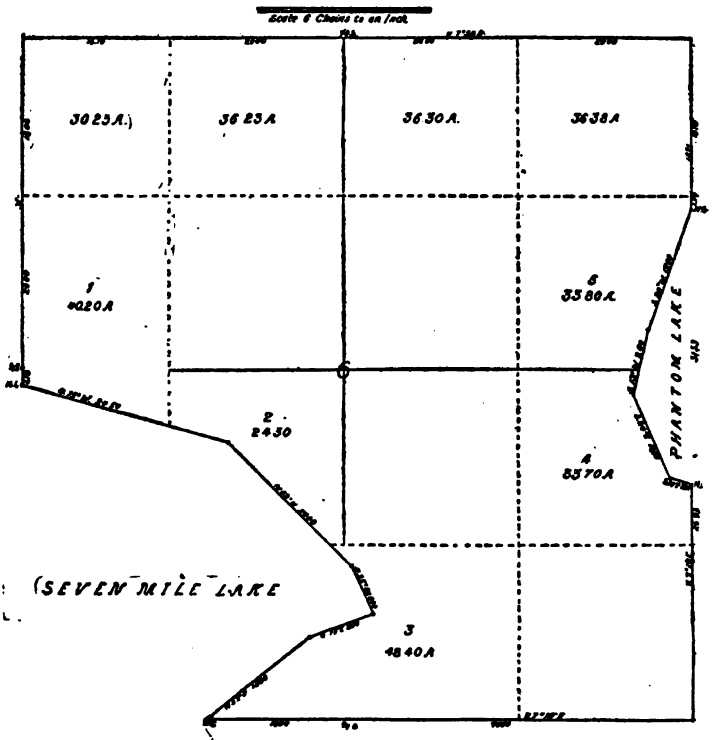
The court found that the map on page 336, known in the case as "Exhibit I," is a copy of the original map of section 6, as shown by the United States survey and field notes.

The court further found that section 6, as it actually exists upon the ground, is accurately shown by the map on page 337, which is known as "Exhibit J."

It will be seen that by the government map most of the lake upon the east line of the section is represented to be in section 5, whereas in fact most of said lake is in section 6,

EXHIBIT I.

SECTION 6, TOWNSHIP No. 39 NORTH, RANGE No. 12 EAST,
OF THE 4TH PRINCIPAL MERIDIAN WISCONSIN

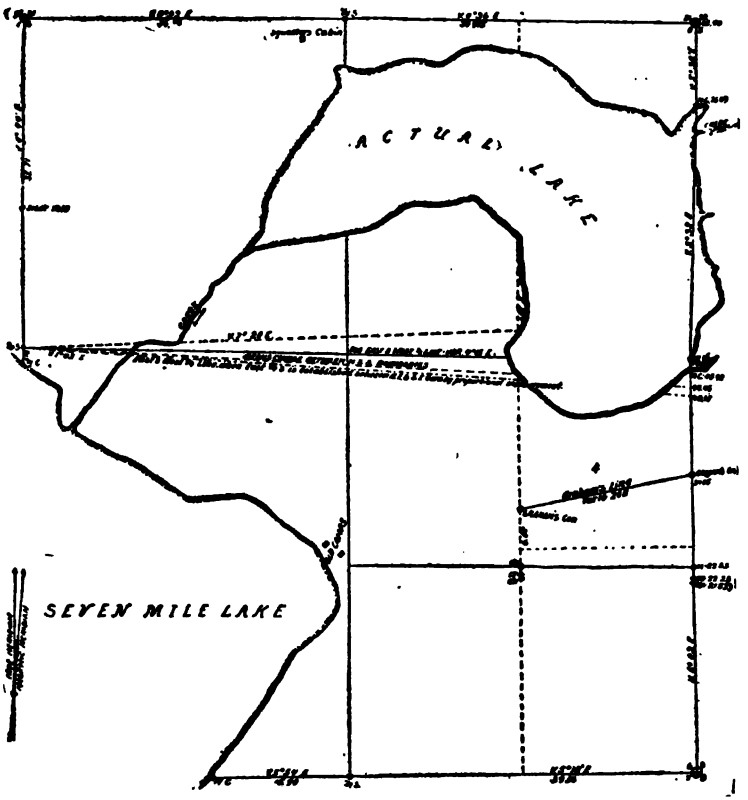


The above Map of Section 6 Township No 39 North Range No 12 East of the 4th Principal Meridian, Wisconsin, is strictly conformable to the field notes of the survey thereof on file in the Office of the Commissioner of Public Lands, Madison

and it is also some distance north of the location assigned to it in the government map.

The court further found that by the report of the United States survey the east quarter post of said section would fall in the lake, and that for that reason no quarter post was set; that the northeast, northwest, and southeast corners of the section were found, and that the place for the southwest corner fell in another lake, called Seven Mile Lake; that

EXHIBIT J.



the west and north quarter posts of the section were found, but that the south quarter post was not found, but that its proper place was determined, and both parties claim it to be in the same place; that the two meander posts upon the east line of the section were found; that the United States survey gives the distance from the southeast corner of the section to the south meander post as 26 chains and 93 links, while by actual measurement said distance is 45 chains and 92 links, and that the distance between the meander posts

as given by the United States survey is 31 chains and 52 links, while in fact the same is 30 chains and 8 links; that the distance from the north meander post to the north corner of the section as given is 19 chains and 75 links, while in fact the same is 9 chains and 39 links; that the north and south lines of the section purport to run due east and west; that a due east and west line from the west quarter post would strike the east section line in the lake at a point 47 chains and 5 links north of the southeast corner; that a line running from the west quarter post in a mean course between the north and south section lines would strike the east line of the section south of the lake at a point 1 chain and 46 links south of the meander post, and 44 chains and 46 links north of the southeast corner of the section; that if this last line is the true east and west quarter line, as plaintiffs claim, then the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of the section contains about 44 acres, and lot 4 contains about 36 acres, and the defendants trespassed upon the plaintiffs' land and cut therefrom timber of the value of $2,132.83, but if the place of the east quarter post is north of the south meander post and in the lake, and if the north corner of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ should properly be fixed by apportioning to its east side $\frac{8000}{8003}$ of 46 chains and 10 links, as the defendants claim, then the said S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ is 34 chains and 23 links long on the east side thereof, and contains about 60 acres of land, and lot 4 contains about 20 acres of land, and the defendants have not trespassed; that by the United States plat and survey the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ is represented to be a normal 40 acres of land, 20 chains in length on the east side thereof, and the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of lot 4 is represented as containing 33.70 acres; that the line claimed by the defendants as the north line of the S. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ is a line marked "Graham's Line" on Exhibit J, and runs at an angle of 16° 20′ from a due east and west line, and to this line the defendants cut, and no further.

Upon these facts, the court concluded that the true east and west quarter line of section 6 is a line running east from the west quarter post in a mean course between the north and south lines of the section, and that the plaintiffs should have judgment for the value of the timber cut. Judgment being entered in accordance with these findings for the plaintiffs, the defendants appeal.

For the appellants there was a brief by *John E. Martin*, attorney, and *Ryan, Hurley & Jones*, of counsel, and oral argument by *M. A. Hurley*.

For the respondents there was a brief by *Hooper & Hooper*, and oral argument by *Moses Hooper*.

WINSLOW, J. The question in the case is simply a question of correct surveying. The court is required to find the true line of division between the S. E. ¼ of the S. E. ¼ of section 6, and the N. E. ¼ of the same quarter section, or (as it is called on the government plat) lot 4. The line must be found by following the principles laid down by the laws of the United States, if they be applicable. *Whitney v. Detroit L. Co.* 78 Wis. 240. Sec. 2396 of the Revised Statutes of the United States provides as follows:

"The boundaries and contents of the several sections, half-sections and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

"First. All the corners marked in the surveys, returned by the surveyor-general, shall be established as the proper corners of sections or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

"Second. The *boundary lines*, actually run and marked in the surveys returned by the surveyor-general, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary lines which

have not been actually run and marked, shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township."

The defendants' claim is that the line from the southeast corner of the section north to the meander post is the east boundary line of the southeast fractional quarter section, and that the meander post is the northeast corner thereof; that, the length of such boundary line being marked on the government plat as 26 chains and 93 links, that must (under subd. 2 of the section quoted) "be held and considered as the true length thereof;" that, the actual length of such line on the ground being found to be 45 chains 78 links, the excess in distance must be apportioned, and the S. E. ¼ of the S. E. ¼ being represented to be a full 40 acres, of 20 chains square, its proportion of the actual distance must be found thus: As 26.93 is to 45.78 so is 20 to the east line of the parcel; which, when worked out, makes the east line of said 40 acres 34 chains in length, and establishes the north line of the parcel upon the line marked "Graham's Line" upon Exhibit J.

The defendants' case rests wholly on the correctness of this proposition. The difficulty with the contention is that the meander post is not a corner nor the meander line a boundary. The lake (if within the quarter quarter section) is the boundary, and not the meander line or meander post. *Whitney v. Detroit L. Co.* 78 Wis. 240. Hence the east boundary line of the quarter section did not stop at the meander post, but ran to the lake, if the lake was within the quarter quarter section. It follows from this that though the east boundary line of the S. E. ¼ is marked on the government

map, and the meander post must be held to fix the position of the line east and west, still such line does not terminate at the meander post, and 26 chains 93 links is not the length of the boundary line. The length of this east boundary line, therefore, was not returned by the government surveyors, and hence no case arises for the application of the provision that the length of boundary lines as returned shall be held and considered as the true length thereof.

We must therefore resort to other means to find the division line which we seek.

The plaintiffs' land is represented as extending to the lake; hence the lake is the northern boundary, if in fact it be in that quarter quarter section. When a lake or watercourse is the boundary, we can proceed in search of that boundary until we reach the next line which divides quarter quarter sections, and there, if the lake be not reached, we must stop. *Lally v. Rossman*, 82 Wis. 147. This necessitates the ascertainment of the east and west quarter line of the section, which was not run through by the government surveyors to the east boundary line, because supposed to end in the lake. The west quarter post of the section is found, and both the north and south lines of the section are found. The first subdivision of the statute quoted says that "the corners of half and quarter sections not marked on the surveys shall be placed as nearly as possible equidistant from two corners which stand on the same line." The second subdivision says that "boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary line of such fractional township."

It is unnecessary here to inquire which one of these provisions is applicable to the present case. Either one of them brings the east quarter post south of the lake, and south of the meander post, as is shown by reference to the map, Exhibit J. Due east and west means a mean course between the north and south boundaries of the section, where such boundaries are ascertained and fixed. It is so held in the circulars of information issued by the general land office of the United States, June 2, 1887, December 9, 1890, and October 16, 1896, and the same rule is laid down by standard writers on surveying.

This corner being established south of the lake, the defendants' whole contention must fail. The S. E. ¼ of the S. E. ¼ becomes a normal quarter, with its north line established on a mean line between the south line of the section and the east and west quarter line.

By the Court.—Judgment affirmed.

PATRICK, Appellant, vs. TOWN OF BALDWIN, Respondent.

February 7 — February 26, 1901.

(1, 2) *Justices' courts: Notice of appeal: Towns.* (3–5) *Poor laws: Support of pauper by private person: Liability of municipality: Implied contract.*

1. Mistakes in a notice of appeal from a judgment rendered in justice's court do not render such notice ineffective if it contains enough to identify, with reasonable certainty, the judgment, the parties, and the court, and to show that it was made by the party appealing, personally, or by some person or persons duly authorized, in behalf of such party.
2. A notice of appeal from a judgment rendered in justice's court against a town, signed by three persons with the word "Supervisor" under the last signature, the signatures and the official designation being so located that if the plural number were used

instead of the singular it would clearly indicate that all signed officially, shows with reasonable certainly that it was so signed, where there is no indication in the notice to the contrary.

3. There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons in the absence of a statute creating one, and the court has no power, upon the ground of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person.

4. Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract.

5. The statute requiring each town in this state to support poor persons in certain cases, and the supervisors thereof to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town without a contract to that effect, made between him and such supervisors or a majority thereof.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

The cause was commenced against the defendant town in justice's court, wherein such proceedings were had that judgment was duly rendered in plaintiff's favor for $101 damages and $20.91 costs, for services rendered as a physician in attending Richard Bruaas, a poor person having a legal settlement in said town, without any direction or employment by the supervisors of said town, or either of them, and, so far as the complaint states the facts, without any notice to such supervisors or either of them, or any knowledge on their part of the rendition of such services or the necessity therefor.

Within the time required by law an appeal from such judgment was attempted to be taken by the supervisors of the town to the circuit court. Each of such supervisors made

an affidavit in due form of law for the purposes of such appeal, in which he testified that he made such affidavit in his official capacity. Such affidavits, with a paper intended as a notice of appeal in the action, were duly served on the justice. Such notice of appeal was signed as follows: "P. C. Finvold, Wm. Ferg, Jacob De Jong, Supervisor of the *Town of Baldwin*, Defendant." Such notice and affidavits were recognized by the justice to be in due form of law, and sufficient to perfect an appeal from said judgment on the part of defendant, and the papers were accordingly certified to the circuit court.

When the cause came on for trial in such court, plaintiff's attorneys moved for an order dismissing the appeal because the notice thereof was insufficient, which motion was denied, due exception being taken to the court's ruling. In due time objection was made to the reception of any evidence because the complaint failed to state facts sufficient to constitute a cause of action against defendant. The objection was sustained. Plaintiff's counsel then made application for leave to amend the complaint by alleging that on December 23, 1898, plaintiff caused the chairman of the board of supervisors of the town to be notified of the necessity for immediate medical services to be rendered to Richard Bruaas and of the fact of his being a proper subject for relief by the town, as a pauper. The application was denied. Judgment was thereupon rendered dismissing the action, with costs. Plaintiff's counsel excepted to each of the court's adverse rulings, including that on a motion made for a new trial.

For the appellant there were briefs by *E. B. Kinney* and *A. J Kinney*, and oral argument by *A. J. Kinney*.

James A. Frear, for the respondent.

MARSHALL, J. The notice of appeal was sufficient. Strict accuracy is by no means necessary in such a paper in order

to confer jurisdiction upon the appellate court. Mistakes, however numerous, are immaterial if the notice yet contains enough to fairly identify the judgment, the parties, and the court, and to show that it was made by the party appealing, or some one authorized to do so, which authority need not expressly appear, it being sufficient if it be fairly inferable from the language of the notice and the manner in which it is signed. The law in that regard is too well settled to need any citation of authority to support it. The alleged defect in the notice is that it was not signed by the town of *Baldwin*, using the name of the town, or showing that some person or persons acted in the matter as agent or agents for the town, having authority so to do. A corporation must of necessity act by an agent, and that agent need not necessarily be an officer of the corporation, nor need any proof of the agency accompany the notice. If there is enough in a notice of appeal to indicate that it was made by a person assuming to act as agent of the appellant, though the agent in signing used only his name as such, his authority will be presumed till the contrary is shown. *Benjamin v. Houston*, 24 Wis. 309. The notice in question was signed by three persons, with the word "Supervisor" under the last signature, indicating that at least such signer acted in his official capacity for the town. We think it is fairly inferable that all the signers acted officially, and that by mistake the singular number was used instead of plural in specifying the official character.

The contention is made that, inasmuch as by sec. 1499, Stats. 1898, the defendant was required to relieve Bruaas, no notice of his necessities to its supervisors was necessary to create a legal liability to one who voluntarily, from motives of humanity, administered to his wants, and that since by sec. 1501 such supervisors were required to see that he was properly relieved, neglect on their part, after receiving notice from plaintiff of circumstances calling for action to that

end, was tantamount to a request to plaintiff to perform the service required. To support those propositions, *Mappes v. Iowa Co.* 47 Wis. 31, is cited. That, with what is said in *Davis v. Scott*, 59 Wis. 604, supports both propositions. If they declare the law correctly, the judgment appealed from is wrong. In the first case mentioned the claimant supported an aged woman, who was a pauper, without notifying the municipal officers of the facts, and without knowledge on his part that such person's relatives had failed to comply with an order made according to law requiring them to support her, rendering it necessary for public relief to be furnished, and without the claimant knowing that she was a pauper. The court held that such ignorance excused the claimant for not giving notice of the situation to the municipal authorities; that he was entitled to recover upon the ground of the legal obligation alone; that in view of such obligation the only thing that could preclude the claimant from recovering would be negligence on his part in failing to notify the proper officers so as to give them an opportunity to perform their duty in the matter, and that the claimant was not chargeable with such negligence, since he did not know that the person relieved was a pauper. No authority was cited to support the decision. *Meyer v. Prairie du Chien*, 9 Wis. 233, was referred to on the general subject of the legal duty of a town to support paupers having a legal settlement therein. Such case does not refer even remotely to the principle upon which the *Mappes Case* turned, it being held in effect that a contract between the town authorities and the party furnishing the relief was necessary to give the latter a legal claim against the former. There was a recovery in the court below, and no bill of exceptions on the appeal. In that situation this court said that it would be presumed that a proper contract was made entitling the claimant to recover. The rule of the *Mappes Case*, to its full extent, has never been followed in this court, or at all

here, except in *Davis v. Scott.* In several cases it has been in effect overruled by holdings that a claim against a municipality for the relief of a pauper must be based on an express or implied contract, actually made between the claimant and the proper officials.

Cases exist holding that a public corporation may be held liable without even notice to its officers having authority to act in its behalf, of the necessity for relief to be given a pauper, but they are based on statutes to that effect, as, for instance, by sec. 12, ch. 16, R. S. Vt. 1840, in force when *Charlestown v. Lunenburgh*, 23 Vt. 525, was decided, it is provided that in certain emergencies a person furnishing relief to a pauper, until the lapse of a reasonable time for notifying the proper public officers of such pauper's needs, can recover therefor of the municipality in which such relief is furnished, and that if, after such notice, such officers neglect to perform their duty, he can continue to furnish such relief and look to such municipality for his pay. We have no such statute. There is much judicial authority to the effect that if one furnish necessary relief to a poor person, after notice to the public officers of the pauper's needs and neglect on their part to perform their duty, he may recover therefor as on an implied contract. Most of such authority, however, is based on statutes, as, for examples, sec. 18, ch. 46, R. S. Mass. 1836, in force when *Smith v. Colerain*, 9 Met. 492, was decided, provides that, "every town shall be held to pay any expense, which shall be necessarily incurred, for the relief of a pauper, by any person who is not liable by law for his support, after notice and request made to the overseers of the said town, and until provision shall be made by them;" sec. 4, part 1, ch. 2, tit. 15, Gen. Stats. Conn. 1875, in force when *Wile v. Southbury*, 43 Conn. 53, was decided, was to the effect that, 'any person relieving a poor person after notice to the proper public officers of the needs of such poor person and a neglect of such

officers to perform the duty, may recover therefor upon an implied contract;' sec. 48, ch. 32, R. S. Me. 1841, in force when *Perley v. Oldtown*, 49 Me. 31, was decided, is to the same effect; but in *Beetham v. Lincoln*, 16 Me. 137, it was decided that in the absence of a statute making it the duty of a municipality to relieve a poor person standing in need thereof, and neglect of its proper officers to attend to the matter, after receiving notice of such need, sufficient to constitute an implied request by such officers to another to furnish relief, such circumstances do not create contract relations between such municipality and such other upon which the latter can recover of the former. *Seagraves v. Alton*, 13 Ill. 366, is to the opposite effect, but it is not a well-considered case, as is evidenced by the fact that none of the authorities cited supports the conclusion reached. It holds that the legal obligation of a municipality to support a poor person, and neglect of its officers to act in its behalf, is sufficient to warrant the court in inferring a promise by such officers, to one who stands in place of the municipality and prevents the suffering that would otherwise result from the neglect of its agents, to compensate him therefor. The case went to the full extent of holding that such a promise will be inferred in certain emergency cases even in the absence of any neglect on the part of municipal officers. The decision followed closely the lines of those cases we have referred to that are based on statutes, seemingly ignoring the rule often laid down that, while there is a strong moral obligation resting upon organized society to relieve all poor persons in its midst standing in need thereof, there is no legal obligation to do so in the absence of a statute creating it, and that the courts cannot go further than the legislative will has been expressed.

To what extent, under what circumstances, at what place, and by what agencies poor persons shall be relieved at the expense of the public, are all purely legislative questions.

When the legislature has gone no further than to create a legal obligation to support poor persons, and to designate municipal agents to incur the necessary obligations to that end, no such obligation can exist without some clearly expressed municipal consent given by such agents. In short, where the statute contemplates that all liabilities for the support of the poor shall rest on contract, that is the exclusive way of incurring them, and a meeting of minds is just as essential to such a contract as to any other. The doctrine thus stated is generally recognized as controlling. In *Overseers of the Poor of North Whitehall v. Overseers of the Poor of South Whitehall*, 3 Serg. & R. 117, often cited on the subject discussed, it was said, "Whatever may be the duty of individuals, from religious or charitable considerations, it is certain the public is bound by no moral obligation to support the poor of the community. That duty, being legal and of positive institution, is to be carried no further than the express provisions of the poor laws." In *Smith v. Colerain*, 9 Met. 432, the situation was this: The statute expressly made a town liable on an implied contract in certain but not in all cases of a person furnishing necessary relief to a pauper whom such town was legally bound to support. Relief was furnished to such a person by a private party, the officers of the town having refused to do so. The person relieved was not at the time located where the law required as a condition of an implied contract to pay for such relief, when furnished by a private party, though he was where the overseers of the poor placed him and might have continued to support him. In deciding the case Chief Justice SHAW said: "There was no express undertaking to pay the plaintiff; and whether a contract could be implied depends upon the statute liability . . . It has been too often decided to be now questioned, that the liability of towns to support poor persons is founded upon and limited by statute, and is not to be enlarged or modified by any supposed moral obligation."

In *McCaffrey v. Shields*, 54 Wis. 645, it was said that, "the defendant town cannot be held liable . . . unless its supervisors, or at least two of them, requested" the service to be performed. The court did not feel called upon to overrule *Mappes v. Iowa Co.*, because the facts in the two cases were different, though it seems that the principle involved, of whether a contract is necessary upon which to found a legal liability against a town for the relief of a poor person, was decided differently in the one case than in the other.

In *Dakota v. Winneconne*, 55 Wis. 522, it was held that a contract is necessary to a liability of the kind in question, though it is not necessary that the supervisors act in a body in making it; that if one supervisor request the service to be rendered, with the knowledge and tacit consent of another, and the person furnishing the relief rely upon the conduct of the two as a joint request, it is within reason to say that there is a meeting of minds, and a contract made.

In *Davis v. Scott*, 59 Wis. 604, the court held squarely that the liability of a town to compensate a person furnishing support to a proper subject for relief as a poor person, is fixed by notice to the supervisors to take charge of such subject, and their neglect to do so. It was said that the case was distinguishable from *McCaffrey v. Shields*. That is true as to the facts, but why it is as to the principle of whether some clear indication of a request to furnish relief is necessary to a contract obligation of the town to pay the person performing that service, is not perceived. It seems that an error was committed in that case. Secs. 1513, 1514, R. S. 1878, not now in force, were in substance as follows: 'If any poor person shall become a charge for support to a town in which he has no legal settlement, any town in this state in which such person has such settlement shall be liable over to the former upon condition of its supervisors giving to at least one of the latter's supervisors notice of

the facts and requiring them to take charge of such person. If he shall not be so taken charge of within thirty days after such notice, and all expenses be paid up to such taking, the delinquent town shall be liable to the other for such expenses and all others incurred while such person remains a public charge.' *Dakota v. Winneconne, supra*, arose under such statutes. The defense was made that the plaintiff was not entitled to recover because it did not, acting by its full board of supervisors, contract for the relief furnished and audit the expense thereof. This court, after deciding that a request by two of the supervisors of the town to furnish the relief satisfied all the requisites of a contract under the previous decisions of the court, said that the town ultimately liable could not be heard to complain of any irregularity in regard to making the contract and auditing the claims by the town primarily liable, since the person relieved was a legitimate charge upon the former, and notice to its supervisors of the facts, and a request of them to take charge of such person, was all that was necessary to fix its liability to the plaintiff town. This language was used: "The plaintiff town having given the defendant town the requisite notice to take charge of the pauper, the liability of the latter became fixed." 'It could not, by neglecting its own legal duty, compel the plaintiff to make the expenditure in question, and then defeat its claim therefor because such expenditure was not made by authority of the full board.' The court properly said, on the facts of that case, that notice to the town in which the pauper had a legal settlement fixed its liability to the town primarily liable for the relief, because such was the express mandate of the statute. In *Davis v. Scott* the liability was claimed under secs. 1499, 1501. Only that part of *Dakota v. Winneconne* holding that a contract between the supervisors of the plaintiff and the person furnishing the relief was requisite to its liability therefor to such person, applied. The idea that the part holding that notice

to the town responsible over fixed its liability to the town primarily liable, applied, manifestly was a mistake. For that reason the case cannot be considered as authority ruling the case before us.

In *Jones v. Lind*, 79 Wis. 64, there was proof of a general request by the chairman of the board of supervisors to furnish relief and make monthly reports. Relief was furnished on the faith of such request, reports thereof were made, and bills therefor paid, up to the expiration of such chairman's term of office. He and his associate supervisors supposed that the arrangement was to end with their term of office. He testified to that as a conclusion, though there was nothing in what was said between him and the claimant indicating that the contract was not to continue so long as necessary. Such claimant supposed it was not to terminate without express notice to that effect, if the necessity continued. He was never notified to discontinue his service. The need therefor remained unchanged, and the person served continued to be a proper town charge. The action was for services rendered after the term of office of the supervisors employing the claimant expired. It was held that he was not entitled to recover, the court saying: "As a town can only be chargeable for services rendered by virtue of some contract therefor, we think the circuit court was clearly justified in holding that plaintiff had no cause of action."

In *Beach v. Neenah*, 90 Wis. 623, there was notice to the chairman of the town and a promise by him that the destitute persons should have whatever they needed; and it was said that the evidence was sufficient to show that the supervisors of the town consented that the person giving notice, and to whom the declaration was made, should care for such persons at the expense of the town until they were otherwise cared for.

It is believed that the law, that an obligation against a

town for services rendered in relieving a poor person who is entitled by law to be so relieved can only be incurred in the manner indicated in the statute, was recognized and correctly declared in *Meyer v. Prairie du Chien*, 9 Wis. 233; *McCaffrey v. Shields*, 54 Wis. 645; *Dakota v. Winneconne*, 55 Wis. 522; *Jones v. Lind*, 79 Wis. 64; *Beach v. Neenah*, 90 Wis. 623; and *Putney Bros. Co. v. Milwaukee Co.* 108 Wis. 554; that the agents empowered to act for the municipality in such matters must, either by express contract or by some act or acts from which a contract can be reasonably inferred, bind such municipality, or it cannot be bound at all. Mere passive neglect is not sufficient.

The statute, as has been said, does not indicate that the supervisors must act in a body in contracting for the relief of a poor person. The nature of the duty in such cases is not consistent with such a requirement. The statute must have a reasonable, sensible construction, in view of the duty imposed. It says "the supervisors" shall see that poor persons are taken care of as required by law. That clearly indicates that at least a majority must consent to relief being furnished to a pauper at the expense of their town in order to bind it. If one supervisor acts with the knowledge and consent of another, given either expressly or by his keeping silent when good faith requires him to speak, it may properly be inferred that the two concur in the matter and that there is a sufficient meeting of minds between the proper municipal agents and the person furnishing relief to satisfy all the essentials of a contract. While an implied contract is sufficient, as indicated, it must be established, if one endeavors to recover upon it, the same as any other implied contract. The statute creates a liability to relieve destitute persons, but not a liability to individuals who may voluntarily perform that service. It empowers appropriate agents of municipalities to make their liability effective by necessary contracts to that end, and imposes upon such

agents the duty to exercise such power. If they refuse to do so, they are doubtless amenable in some way for such misconduct, but the law gives no private person the right to perform the duty of such officers. *Otis v. Strafford*, 10 N. H. 352. Performance of that duty by the person designated by law is absolutely essential to create a binding obligation upon the municipality to compensate one for relieving a poor person, legally entitled to relief at its expense. If the statutes on the subject are defective, it is not for the court to judicially extend them. They came to us from Massachusetts indirectly, having been adopted by Michigan, then by this state. It must be presumed that there was a purpose in making the change which we have pointed out between the Massachusetts statutes and our own, for, without the change, mere neglect of the supervisors of a town to act when they ought to act for the relief of a poor person, would give a private party, not liable by law to furnish such relief, and residing in such town, the right to do so at the expense thereof. There is no more reason for holding that a person may aid a pauper, upon the supervisors of the town in which such pauper has a legal settlement neglecting their duty, and hold such town liable therefor, than for holding that one may repair the highways of a town because its supervisors neglect their duty in that respect, and recover of such town therefor. The duty of the municipality in both cases is regulated by statute, and in neither case can it be bound to a private person for services rendered except by contract made as contemplated by law.

From what has been said it follows that the complaint was insufficient and that the objection to any evidence under it was proper. There was not even a suggestion in the complaint that the supervisors of the respondent town had notice of the necessity for furnishing the relief for which the claim was made. The application for leave to amend was properly denied, if for no other reason, because it alleged

mere notice to the chairman of the board of supervisors of the respondent, that Bruaas was a proper town charge and stood in immediate need of relief as such, and that the person giving such notice, the appellant here, was under no legal obligation to furnish such relief. The amendment followed closely the line of decisions to which we have referred, based on express statutes creating a liability under such circumstances. *Smith v. Colerain*, 9 Met. 432.

By the Court.—The judgment is affirmed.

GLENWOOD MANUFACTURING COMPANY, Appellant, vs. SYME and others, imp., Respondents.

February 8—February 26, 1901.

Corporations: Officers: Purchase of corporate notes for individual benefit: Collateral securities: Equity: Remedy at law: Laches: Pleading.

1. Certain guarantors of the notes of a corporation had pledged stock in the corporation and an interest in a partnership as collateral security for said notes and also for their individual indebtedness to the pledgee. The president of the corporation, who was also one of the guarantors of said notes and who had an interest in said partnership, purchased for himself, from the pledgee, said corporate notes and also the pledged collaterals, for less than their true value. The corporation was a going concern, but was embarrassed for want of ready money and unable to pay its debts as they matured. It was alleged that the president made no effort to purchase the corporate notes and collaterals for the benefit of the corporation, although he knew such a purchase would greatly benefit the corporation and all its stockholders, but purchased for himself without the consent of any of the other stockholders. It did not appear that the corporation had any legal right to have the collaterals remain pledged for the security of its debt. *Held*, that the purchase of such collaterals by the president of the corporation did not in any way conflict with any duty he owed to it, and it had no enforceable interest therein.

2. An officer and director of a going corporation may purchase its outstanding obligations at a discount, for his own benefit, and enforce them in full, where he owes no duty to the corporation, inconsistent with such purchase, to act for its benefit.
3. Where the corporation has not been called upon to pay anything upon its notes so purchased by one of its officers, and notes given by it in renewal of the notes purchased are still held by the heirs of such officer, its rights in respect thereto can be protected in an action brought to enforce the notes, in defense of a recovery thereon, and equitable relief is unnecessary.
4. Where in such a case a considerable time has elapsed since the purchase of the notes and since the death of the purchaser, a complaint asking equitable relief in respect thereto should excuse the delay by showing that prompt action was taken upon discovery of the facts.

APPEAL from an order of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Affirmed.*

This is an appeal from an order sustaining a demurrer to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action. The complaint is of great length, but may be summarized as follows:

It first states the corporate character of plaintiff, the amount of its capital stock, the amount issued, the names of stockholders, and the amount held by each. Alexander Syme was president and a director. Plaintiff's business was manufacturing and selling wood products at Glenwood, Wisconsin. The value of its property and assets was $300,000, and its liabilities other than its capital stock were $227,000. On November 1, 1896, and for a considerable time thereafter, the company was embarrassed for want of ready money, and unable to pay its debts as they matured. On and prior to said date a copartnership was conducting a general store at Glenwood, known as Johnston, Syme & Baldwin, composed of the following named persons, whose interests in said firm were: James Johnston, three eighths; Alexander Syme, one fourth; H. J. Baldwin, one fourth; and *David Syme*, one eighth. The first two named were stockholders in the plaint-

iff corporation. The value of James Johnston's interest in said firm was $30,000. The prosperity of said firm depended largely upon the continuation of the business of the plaintiff. The firm dealt with its employees and extended credit to plaintiff during 1896 and early part of 1897 of not less than $30,000. On November 1, 1896, plaintiff was indebted to one H. L. Humphrey, as assignee of Alfred J. Goss, on two notes of $9,000 each, but which had been reduced by payments to the sum of $11,000. Alexander Syme and William and James Johnston were guarantors. At the same time the Johnstons were indebted to Humphrey in a large amount, who held as collateral security for all of said indebtedness, among other things, 427 shares of plaintiff's stock, and the three-eighths interest of said James Johnston in the firm of Johnston, Syme & Baldwin, which had been pledged by the Johnstons, or one of them, to secure said indebtedness. Humphrey offered to sell the notes of plaintiff, the 427 shares of stock, and the three-eighths interest in said firm for $15,000, then worth in the aggregate at least $45,000. Alexander Syme purchased the same for $15,000, for himself, without the knowledge or consent of any of plaintiff's stockholders, knowing that the purchase by plaintiff would be greatly for its interest. To conceal the true character of the transaction, Syme caused the purchase to be made in the name of W. P. Hewitt, who held the same until October 11, 1897, when it was turned over to Syme. The latter took and controlled the three-eighths interest in said firm, and had it until his death, in March, 1898. The firm name was thereafter changed to Syme, Baldwin & Co. No accounting has been had, and, unless otherwise decreed, the surviving partners will pay over the value of said three-eighths interest to Syme's heirs.

In February, 1897, plaintiff was indebted on a note of $18,000 to the Skowhegan Savings Bank, upon which Syme was indorser or guarantor. Without the knowledge or con-

sent of any of the stockholders, or without any effort to purchase the same for plaintiff, Syme purchased the same for $9,000 with his own funds. At the time of the purchase from Humphrey, plaintiff was indebted to Johnston, Syme & Baldwin over $30,000. During his lifetime Syme caused plaintiff to pay on said indebtedness $4,006.17, August 10, 1897, and $3,810.12, October 4, 1897, at a time when plaintiff was still in need of ready money to pay pressing demands. On October 16, 1897, Syme caused plaintiff to execute to him two notes,— one for $11,743.93, and the other for $14,500,— for the indebtedness of plaintiff to the firm of Syme, Baldwin & Co., which were charged to said Syme on their books, and the only right he had thereto was by virtue of his five-eighths interest therein, and at least $20,432.43 of said amount was received by him on account of the three-eighths interest purchased from Humphrey. On October 11, 1897, Syme presented the notes he had purchased from the bank and from Humphrey to plaintiff, and demanded and received a note for the sum of $29,531.18, which note is now held by his heirs. Between August, 1897, and April, 1900, Syme during his lifetime, and his heirs after his death, by using the 427 shares purchased from Humphrey, were enabled to control the election of plaintiff's officers and the business policy of the corporation. Syme died intestate, holding said claims. Administration was granted on his estate December 22, 1898, and the time for presentation of claims expired the first Tuesday of September, 1899. It is alleged that the notice thereof was never published for four successive weeks as required by law, but was published December 29, 1898, and January 5, 12, and 19, 1899. The administrator inventoried the three-eighths interest aforesaid at $20,084.88; said 427 shares of plaintiff's stock, $8,540; and said three notes of plaintiff, $45,277.52. During the course of administration plaintiff paid the two notes of $11,743.93 and $14,500 to the administrator. Some of the money was used to pay

debts of the estate, and the remainder has been distributed to the defendant heirs. Defendants are alleged to have had knowledge of the acts of Syme in the premises.

The prayer for relief is for an accounting regarding the three-eighths interest in the aforesaid firm, and a settlement on the theory that plaintiff was entitled to the benefit thereof; also that plaintiff is entitled to the 427 shares of stock, and a surrender of the notes taken in renewal of the ones purchased from Humphrey and the bank, upon allowance of the sum actually paid out by Syme.

For the appellant there were briefs by *George P. Knowles* and *Clapp & Macartney*, and oral argument by *N. H. Clapp*. To the point that an officer of a corporation cannot purchase the obligations of the corporation at a discount and enforce them at their face, they cited *McDonald v. Haughton*, 70 N. C. 393; *Hill v. Frazier*, 22 Pa. St. 320; *Higgins v. Lansingh*, 154 Ill. 301; *Bonney v. Tilley*, 109 Cal. 346.

For the respondents there was a brief by *S. J. Bradford* and *Warner & Lawrence*, and oral argument by *C. G. Lawrence*.

BARDEEN, J. The sole question for determination is whether we can spell out from the allegations of this complaint a cause of action in favor of the plaintiff and against Alexander Syme. An attempt has been made to allege facts sufficient to show that he was guilty of a breach of duty towards the corporation, which rendered him liable thereto, and for which the defendants, as his heirs, are answerable. As a premise it is to be said that during the pendency of all the transactions set forth in the complaint the plaintiff was a going corporation, in debt, and embarrassed for want of ready money with which to meet current demands. Alexander Syme was its president and a director, and was familiar with its business affairs. At the time of the transaction with Humphrey the company was unable to

meet current demands. It is not shown whether the notes of the corporation held by Humphrey were past due or not. Although the corporation had no funds and had other pressing obligations, it is alleged that Syme, knowing that the purchase of the notes and collateral held by Humphrey "would greatly benefit this plaintiff and all the stockholders thereof, without making any effort to buy the same for this plaintiff, and without the knowledge or consent of any of the other stockholders of the plaintiff," made the purchase for himself in the name of his brother-in-law, Hewitt. How much was paid for plaintiff's notes, or how much for the collateral, is not stated. In the aggregate, the notes and the other securities are said to have been worth $45,000. If it be admitted that the 427 shares of stock and the three-eighths interest in the firm of Johnston, Syme & Baldwin were pledged as security for plaintiff's note,—a fact concerning which the complaint leaves some doubt,— we are at a loss to understand upon what principle of law or equity the plaintiff can claim any interest in the same. Certainly, if plaintiff had paid its notes, the guarantors who put up the collaterals would have been released. It had no claim thereon, and, if it had purchased the same, could not have enforced such purchase against the guarantors of its notes. If the corporation could have raised the money, it would have been its clear duty to have paid the notes and thus released the securities. Again, it is not suggested how plaintiff had any authority under its charter to purchase an interest in a mercantile firm. It may also be doubtful if it had any power to purchase its own stock. Certainly a corporation unable to pay its debts as they matured would not be permitted to purchase its own capital stock or buy an interest in an outside partnership; and if Syme, as managing officer, had counseled or done such a thing with the company's money, he would have been guilty of a gross breach of duty. On the other hand, Mr. Syme was a member of

the firm of Johnston, Syme & Baldwin. The interest of Mr. Johnston was for sale. The corporation had no legal right, either direct or remote, that it should remain pledged for the security of its debt. A purchase of that interest by Mr. Syme did not in any way conflict with any duty he owed the corporation. It did not increase its liabilities or diminish its assets. We will dismiss this branch of the case with the assertion that, so far as the purchase by Mr. Syme of the shares of stock and the interest in the firm is concerned, the complaint is barren of facts showing that plaintiff has an enforceable interest therein. It is also impossible to say with any certainty whether the notes purchased at the same time were purchased at a discount.

The remaining question involves the right of an officer and director of a corporation to purchase outstanding liabilities of the corporation at a discount and enforce them in full. The relative duties and obligations of managers and officers of a corporation to it and its stockholders have been likened to those of trustees and *cestuis que trustent*, and have been considered and enforced with varying degrees of strictness by the courts of this country. They are, however, of one accord on the proposition that a director of a stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, are regarded with jealousy by the courts. He must deal with the interests confided to his care with conscientious fairness, and will not be permitted to secure advantages by virtue of his position prejudicial to the interests he represents. *Twin-Lick O. Co. v. Marbury*, 91 U. S. 587. This court has asserted that rule in numerous cases, a few of which are here noted: *Cook v. Berlin W. M. Co.* 43 Wis. 433; *Haywood v. Lincoln L. Co.* 64 Wis. 639; *Pittsburg M. Co. v. Spooner*, 74 Wis. 307; *Hinz v. Van Dusen*, 95 Wis. 503. The strictness of the earlier cases is somewhat

relaxed in instances when the corporation is still a going concern, as will be noted in the case last above cited. There the distinction between the power of directors in a solvent and insolvent corporation is pointed out by Mr. Justice MARSHALL, and is reasserted in *South Bend C. P. Co. v. George C. Cribb Co.* 97 Wis. 230. See *Barth v. Koetting*, 99 Wis. 243; *Slack v. N. W. Nat. Bank*, 103 Wis. 57. The cases all agree that an officer or director cannot rightfully seek and obtain profit at the expense of the corporation or its stockholders, and is bound to manage its business affairs so as to promote the common interests. The rule has been broadly stated by some of the authorities that "a trustee, executor, or assignee cannot buy up a debt or incumbrance to which the trust estate is liable, for less than is actually due thereon, and make a profit to himself." Perry, Trusts, § 428. That is the doctrine sought to be invoked in this case, as applicable to a director regarded as a trustee of the corporation. But the statement, however correct in its application to specific instances, must be taken with the limitations which belong to it. The foundation of the rule is that a fiduciary agent, owing a duty to his principal, cannot make a contract for his own benefit which is inconsistent with that duty. It is where there is a collision between trust duty and personal interest that the equitable prohibition applies. The cases usually cited to support the doctrine are where a trustee buys in the property of his principal at a sacrifice for his benefit, when, if he bought it at all, it was his duty to do it for his principal, or he makes a contract in behalf of his principal with himself, directly or indirectly, as the other party to the agreement, or where by some secret arrangement he makes a profit directly at the expense of his principal. The following cases are illustrative of the rule thus stated: *Bird C. & I. Co. v. Humes*, 157 Pa. St. 278; *Koehler v. Black River Falls I. Co.* 2 Black, 715; *Higgins v. Lansingh*, 154 Ill. 301; *Slade v. Van Vechten*, 11

Paige, 21. As before stated, the entire basis of the rule consists in the collision between trust duty and personal interest. Can it be said that any such conflict exists in the ordinary case of the purchase by a director in a going corporation of its outstanding obligations? This is the test to be applied to the facts stated in the complaint. It is nowhere stated whether the notes purchased by Syme were due or not. It is not claimed that any fund had been provided for the payment of these obligations. No special liquidation thereof had been ordered by the corporation. No fact or circumstance is alleged charging him with a present duty to act for the corporation which would make it inconsistent for him to make a personal purchase of these notes, save that he was an officer and director. On the contrary, it is alleged that the company was embarrassed and without funds to pay pressing demands,— not that it was insolvent, but hard up. There was no present duty resting upon Syme to extinguish the notes, so far as appears from the complaint. It is not charged that he neglected any duty he owed to the corporation in not securing funds for their discharge, or that he diverted any of its moneys properly applicable thereto to other purposes. The plaintiff's case rests upon the bald proposition that, being an officer, he could not purchase said notes at a discount. We are not prepared to accept this statement in its entirety. It is only in cases where the conflict of duty mentioned arises that the rule is received in its fullest application. Thus, in Morawetz, Priv. Corp. § 521, it is said: "So, an agent of a corporation may purchase claims against the company at a discount, and enforce them in full, if he is not under obligation to make the purchase on behalf of the corporation." The supreme court of Kansas approved this statement as the law in a case where the treasurer of a railroad company purchased its promissory notes at a discount, and he was allowed to enforce them at their full face value. *St. Louis,*

Ft. S. & W. R. Co. v. Chenault, 36 Kan. 51. In *Inglehart v. Thousand Island H. Co.* 32 Hun, 377, the law is stated thus: "So, also, a trustee or director may with his own money purchase for himself, of a third person, a valid and subsisting outstanding debt owing by the company, and secure a perfect title thereto. Such a transaction is not even the ground for entertaining the suspicion that it is in violation of any duty which he owes the corporation, and there is no presumption of law against its fairness. . . . The other question to be considered in this connection is, Will the trustee or director be permitted to enforce a collection of the debt thus acquired for its entire amount, or shall he be limited to the sum which he actually paid for the debt or obligation? I am unable to discover any good reason why he should not be permitted to enforce payment for the full amount, nor can I find any decision limiting the trustee to the sum actually paid." See *S. C.* 109 N. Y. 454. In *Bradly v. Marine & R. P. M. & M. Co.* 3 Hughes, 26, the syllabus reads as follows: "The president of a corporation may with his own means (the company being embarrassed and without funds to do so) purchase the past-due, outstanding bonds of the corporation, and hold the same as against the company." Perhaps the best-considered and most elaborate discussion of the question under consideration is found in *Seymour v. Spring Forest C. Asso.* 144 N. Y. 333, to which reference is made as supporting the conclusion here reached.

But we need not prolong the discussion. As we construe the complaint, it fails to show any breach of duty on the part of Mr. Syme for which he could be held liable in this action. But, should it be deemed otherwise, still we cannot see how this action can be maintained, if, as we have seen, plaintiff is not entitled to the collaterals mentioned. The notes given to Syme in renewal of the ones purchased are yet held by his heirs. In an action to enforce them, plaint-

iff would have a complete remedy for its grievances, if they were real, in defense of a recovery thereon. So far as appears by the complaint, the plaintiff has never been called upon to pay a cent on these notes, either interest or principal. Under the circumstances stated, the necessity of applying to a court of equity for relief is not apparent. See *Matteson v. Ellsworth*, 28 Wis. 254; *Miller v. Rouse*, 8 Minn. 124.

Another objection of some importance is urged. It is nowhere alleged when the corporation discovered the alleged shortcomings of Syme. Considerable time has elapsed since the alleged transactions took place, and since Syme's death. If they were voidable at the election of the corporation, the rule is that prompt action must be taken upon sufficient knowledge of the facts. *Seymour v. Spring Forest C. Asso.* 144 N. Y. 333. Delay must be excused when there is an appeal to equity.

What has been said renders it unnecessary to consider the question whether plaintiff's claim would be barred by failure to present a claim against the estate of Syme in the county court.

By the Court.— The order of the circuit court sustaining the demurrer is affirmed.

MARSHALL, J., dissents.

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EGAARD and another, Appellants, vs. DAHLKE and another, imp., Respondents.

February 8 — February 26, 1901.

(1-3) *Judgment: Failure to dispose of entire controversy: Signature by clerk: Appeal: Demurrer sustained on inconsistent grounds.* (4) *School districts: Illegal purchase of site: Taxpayers' action: Pleading: Joinder of causes of action: Remedy at law: Demand, when necessary.*

1. A judgment in favor of two defendants whose separate demurrer to the complaint had been sustained, which leaves undetermined the rights of the plaintiff as against other defendants, is error and prejudicial to the plaintiff. Under the Code there can be but a single final judgment, except as a contrary practice is expressly authorized by sec. 2883, Stats. 1898, providing that the court may render a separate judgment *against* one or more of several defendants whenever a several judgment may be proper.
2. The signature of the clerk to a judgment "by the court" is merely his certificate that it was entered by the court. An appeal therefrom is therefore not an appeal from the action of the clerk.
3. Where the trial court sustains a demurrer on two inconsistent grounds its action in the premises must stand if the pleading is vulnerable to either objection.
4. In an action brought by taxpayers against a school district and others, the complaint alleged that the school board had, for a valuable consideration, unlawfully and with a fraudulent purpose entertained by both the board and other defendants, purchased from the latter certain land for a school-house site; and a part of the relief demanded was a rescission of the purchase and the return to the school district treasury of the consideration paid therefor. *Held:*

   (1) The assertion of a valuable consideration was a sufficient allegation that moneys of the district had passed to the vendors in pursuance of the unlawful and fraudulent purpose entertained by them.

   (2) The facts stated would warrant equitable relief against said vendors, especially in view of the adverse attitude of the school board, which renders necessary a suit in equity by taxpayers, instead of a direct action at law by the district to recover the money paid.

(3) There was no misjoinder of causes of action, although a contract between the board and another defendant for the erection of a school-house on said site was alleged, and an injunction restraining all further proceedings was prayed for.

(4) The fact that all the officers of the district were participants in the wrong complained of, rendered unnecessary any prior demand upon the district to proceed for the relief sought.

APPEAL from a judgment of the circuit court for St. Croix county: E. W. HELMS, Circuit Judge. *Reversed.*

This action was brought by the plaintiffs, as taxpayers, on behalf of themselves and others, against School District No. 5 of the Town of St. Joseph, in St. Croix county, the individual members of the town board as such, and against Peter Kircher, *Michael Dahlke*, and *Mary Dahlke*. The complaint alleged that on January 3d the district meeting designated a site for a school-house at the center of section 6, and authorized the purchase of the land and building a school-house there; that, in defiance of this instruction, the defendants *Michael Dahlke* and *Mary Dahlke* with full knowledge unlawfully sold to the board, for a valuable consideration, a parcel of land in section 5, about half a mile distant, for the purpose of defrauding the taxpayers of the district and defeating the will of the legal voters; that the district board had entered into contract with the defendant Kircher for the building of a school-house on such unlawful site, and that he was proceeding thereto. The relief demanded was the enjoining of all further proceedings, and the rescinding and cancellation of the purchase from the *Dahlkes*, and return to the district of the consideration paid therefor. *Michael Dahlke* was one of the district board, to wit, the treasurer, and was joined as defendant in that capacity as well as personally.

The district and the district board answered, the defendant Kircher defaulted, and *Michael* and *Mary Dahlke*, in their personal capacity, demurred on the ground that the

complaint fails to state a cause of action, and for misjoinder of causes of action. Their demurrer was sustained on June 26, 1900. On October 2, 1900, judgment was entered upon stipulation against the defendant school district and in favor of the plaintiffs for costs. On October 20, 1900, the defendants *Michael* and *Mary Dahlke* moved for judgment in their favor on notice and application showing that no amendment of the complaint had been made, and accordingly judgment was entered in favor of such defendants and against the plaintiffs for $37 costs, but making no reference to any of the other defendants, to wit, the three members of the school board and the defendant Kircher. From that judgment the plaintiffs appeal.

A. J. Kinney, for the appellants.

For the respondents there was a brief by *Baker & Haven*, and oral argument by *Spencer Haven*.

DODGE, J. Two grounds of error are assigned on this appeal: (1) that the judgment is irregular and erroneous, in that it does not dispose of the whole action; (2) that the demurrer was erroneously sustained.

1. The judgment appealed from cannot be sustained upon any theory. It adjudicates only with reference to the two defendants *Michael* and *Mary Dahlke* in their individual capacity, and leaves unadjudicated the controversy between the plaintiffs and all of the other defendants except the school district, against which separate judgment had already been rendered. It matters not whether the previous judgment in favor of the plaintiffs and against the defendant school district was proper or improper, the fact still remains that there are numerous other defendants whose rights must be disposed of in order to finally determine this action. The practice under our Code contemplates and permits but a single judgment in an action. *Trustees of St. Clara F. Academy v. Delaware Ins. Co.* 93 Wis. 57; *Hyde v.*

German Nat. Bank, 96 Wis. 406; *Allen v. Boberg*, 108 Wis. 282. This rule is general and universal, except as contrary practice is expressly authorized by sec. 2883, Stats. 1898. That statute permits no separate judgment in favor of individual defendants. It provides: "In an action against several defendants the court may, in its discretion, render judgment *against* one or more of them, leaving the action to proceed against the others whenever a several judgment may be proper." The judgment appealed from is not *against*, but *in favor* of, certain defendants, and therefore does not come within the statutory permission to vary from the general rule above stated. No judgment awarding these defendants the relief which this accords could properly have been entered until the rights as between plaintiffs and all the other defendants had been ascertained, so that a single judgment could have passed thereon and finally determined the action.

This error is not, as respondent urges, without prejudice to the plaintiffs, for it leaves the case in a situation where their further procedure is certainly embarrassed, if not obstructed. There being no power or authority in the court to render more than one judgment, save as permitted by the statutes above mentioned, it is difficult to see how the plaintiffs could proceed to secure an adjudication upon their claims against the other defendants without first eliminating this judgment from the record, either by application to the trial court or by appeal.

Neither is there force to the respondents' contention that this is an appeal from the action of the clerk. The judgment appearing in the record is "by the court." Its signature by the clerk is merely his certificate that by the court it was entered. Ostensibly, it is a final adjudication by the court, and must be recognized as such wherever presented.

2. The question of the sufficiency of the complaint is raised, and we have deemed it best to express an opinion thereon,

although apparently the whole object of this litigation has ceased, so that courts ought not to be burdened further with it. In this connection we would suggest to the trial court that, if the litigation be further persisted in unnecessarily by either party, disapproval thereof might be evinced in the exercise of the trial court's statutory discretion over the allowance of costs.

The grounds of demurrer are that the plaintiffs fail to state a cause of action as against these two defendants, and that there is a misjoinder of causes of action. The court below sustained the demurrer on both grounds, wherein, as appellants' attorney points out, there is a very obvious inconsistency. If no cause of action is stated as against these defendants, it is difficult to perceive how the attempt to do so can have constituted a misjoinder of causes of action. However that may be, doubtless the order sustaining the demurrer must stand, if the complaint is vulnerable to either objection.

The cause of action presented by the complaint in this suit is an equitable one to prevent the unlawful acquisition of site and erection of school-house at a place not authorized by the electors of the school district, and in order to accomplish that purpose, and to prevent depletion of the fund appropriated by those electors for a school-house site and building elsewhere, to undo any unlawful act or acts performed in the course of that unlawful purpose. It is alleged that in the course of that unlawful scheme the school board have unlawfully, and with a fraudulent purpose, entertained both by them and by these respondents, purchased from the latter certain real estate for a valuable consideration, and a part of the relief demanded is the rescission of that conveyance, and the return to the school district treasury of the valuable consideration so paid. Under the liberal rules of construction accorded pleadings upon demurrer thereto, the assertion of a valuable consideration we deem

a sufficient allegation that moneys of the district have passed to the respondents in pursuance of the unlawful and fraudulent purpose entertained by them. If uncertain, the remedy was by motion to make more definite; not by demurrer. Thus construed, the complaint states facts warranting some part, at least, of the equitable relief demanded against these respondents, and that relief is an entirely natural incident to the general purpose of the action as above outlined, even though it might have been possible for the district, by a direct suit at law, to recover back any consideration unlawfully paid, especially so where, as here, the suit is necessarily brought in equity by a taxpayer by reason of the adverse attitude of all of the district officers. *Willard v. Comstock*, 58 Wis. 565; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245; *Webster v. Douglas Co.* 102 Wis. 181, 189; *Douglas Co. v. Walbridge*, 38 Wis. 179; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 139.

The last consideration also disposes of respondents' contention that the complaint fails to allege any demand upon the district to proceed for the relief sought. The fact is alleged that all of the district officers are participant in the wrong complained of, from which the futility of any demand must be apparent. *Doud v. W., P. & S. R. Co.* 65 Wis. 108; *Cunningham v. Wechselberg*, 105 Wis. 359, 361.

We conclude, therefore, that the complaint states a single cause of action in equity, of which the rescission of the purchase of an unlawful site from the respondents and recovery back of the consideration paid therefor is a proper part, and that the respondents' demurrer should have been overruled.

By the Court.— Judgment reversed, and cause remanded for further proceedings according to law.

109 372
117 *535 TEMPLE, Respondent, vs. THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

February 8 — February 26, 1901.

Fire insurance: Standard policy: Option to rebuild: Valued policy clause.

1. The standard policy of fire insurance is a statutory law as well as a contract and should be treated and construed accordingly.
2. The standard fire insurance policy provides (sec. 1941–44, Stats. 1898) that the liability of an insurance company thereunder shall be limited to the actual cash value of the property at the time any loss or damage occurs, except when otherwise provided by statute; that such liability shall not exceed the cost of repairing or replacing the property; and that it shall be optional with the insurer to repair, rebuild, or replace the property within a reasonable time by giving notice to that effect. *Held*, that the insurer has an option to rebuild a building which has been wholly destroyed, notwithstanding the provision of sec. 1943 that the amount written in a policy upon real property which has been wholly destroyed must be taken conclusively to be the true value of the property when insured and the true amount of loss and the measure of damages when destroyed.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Reversed.*

For the appellant there was a brief signed by *W D. Van Dyke*, of counsel, and oral argument by *Mr. Van Dyke* and *Mr. F. V. Brown.*

For the respondent there was a brief by *E. B. & R. E. Bundy*, and oral argument by *R. E. Bundy.*

CASSODAY, C. J. It appears from the record, and is undisputed, that prior to January 15, 1900, the plaintiff was the owner of a two-story frame hotel building situated in the village of Knapp, and had procured thereon, and then held, seven policies of insurance, each insuring him against all direct loss or damage by fire to said building, to the amount

stated in such policies, respectively, issued by the several defendants herein, together aggregating the sum of $6,000, which policies were each and all in the form of the Wisconsin standard fire insurance policy, as established by secs. 1941–43 to 1941–62, Stats. 1898; that January 15, 1900, the hotel building described, of the plaintiff, was wholly destroyed by fire; that on or about February 14, 1900, the plaintiff served due proofs of such loss upon each of such insurance companies; that on or about March 9, 1900, notice in writing was served on the plaintiff for and in behalf of each and all of such insurance companies, wherein and whereby they each and all elected, in effect, to rebuild said hotel pursuant to the terms of their respective policies without any unreasonable delay, and thereby notified and required the plaintiff to furnish the companies or their adjuster with verified plans and specifications for such rebuilding, as requested in a former letter, and that any delay in furnishing the same would necessarily result in delaying such rebuilding; that on or about March 27, 1900, the plaintiff replied in writing to such notice, to the effect that he did not wish the companies to rebuild the building, that he would not accept any building which might be built by such companies in satisfaction of such loss, that such building was wholly destroyed, and that he was entitled to the amount of his written insurance, and would insist on the payment of the same; that on or about April 11, 1900, the adjuster in behalf of each and all of such insurance companies again notified the plaintiff that the plans called for by such companies February 26, 1900, and again March 9, 1900, had not been received, that such companies were waiting for the plaintiff to furnish such plans and specifications in order that the hotel might be rebuilt and completed in the same manner as it was at the time of the fire, January 15, 1900, and that, if he failed to furnish such plans and specifications within a reasonable time from that date, the insur-

ance companies would proceed to rebuild his hotel from the best information obtainable with reference to the plans of the same, and the quality and variety of the various kinds of material contained in the building at the time of the fire; that on or about April 16, 1900, the plaintiff replied to the effect that, in order to avoid any technical want of performance of the contract on his part, he had determined to furnish the plans and specifications thereunto attached, but did not furnish them for the purpose of having the companies rebuild his hotel; that he thereby notified the companies that he did not consent to their rebuilding the same on his premises, that he would not accept any building placed thereon in satisfaction of the loss in whole or in part, that the building was totally destroyed, and that he claimed the full amount of the insurance, $6,000, in cash, and would insist upon its payment.

On or about April 24, 1900, the plaintiff, in pursuance of sec. 2609*a*, Stats. 1898, commenced this action against each and all of such companies and upon each and all of such policies, and demanded judgment against each company for the amount of the policy issued by it, and interest thereon. Each of said seven defendants answered, setting up such standard policy, and the election of all the defendants to rebuild, as stated, and the fact that they had within a reasonable time entered upon the rebuilding of such hotel, and were then engaged in such rebuilding under the clause of the policy authorizing them to so rebuild, and that the same was being done according to the plans and specifications so furnished by the plaintiff.

The cause so at issue having been tried, and at the close of the testimony, the jury, by direction of the court, returned a verdict to the effect that they found for the plaintiff and against the defendants, respectively, for the following amounts, to wit, against the appellant, *The Niagara Fire Insurance Company*, $1,025; The Hanover Insurance Com-

pany, $1,025; The Manhattan Fire Insurance Company, $512.50; The Boston Insurance Company, $512.50; The Milwaukee Mechanics' Insurance Company, $1,025; The Providence-Washington Insurance Company, $1,025; The North British & Mercantile Insurance Company, $1,025. From the judgment entered upon that verdict accordingly, the defendant *The Niagara Fire Insurance Company* brings this appeal.

Counsel for the plaintiff contends, and the trial court obviously held, that the defendants had no optional right, under the standard policies in question, to rebuild the hotel. Secs. 1941-43 to 1941-62, Stats. 1898. This is put upon the ground that another section of the statute, which has been in force for many years, requires that "the amount of the insurance written in" a policy upon real property which had been "wholly destroyed" shall "be taken conclusively to be the true value of the property when insured, and the true amount of loss and the measure of damages when destroyed." Sec. 1943, Stats. 1898. It is conceded that the hotel in question was wholly destroyed. Under such statute this court has frequently held that the amount written in such a policy must, in the language of the statute, "be taken conclusively to be the true value of the property," and for the amount of the loss and the measure of damages, as therein stated, any provision of a written contract to the contrary notwithstanding. *Reilly v. Franklin Ins. Co.* 43 Wis. 449; *Thompson v. Citizens' Ins. Co.* 45 Wis. 388; *Seyk v. Millers' Nat. Ins. Co.* 74 Wis. 67. The same rule applies where there are several policies in different companies upon the real estate so destroyed. *Oshkosh G. L. Co. v. Germania F. Ins. Co.* 71 Wis. 454. No one is here contending that the aggregate amount of insurance written in the seven policies, amounting to $6,000, is not to "be taken conclusively" as the true value of the property destroyed. The contention on the part of the plaintiff is that the standard policy is a mere

contract, and that, in so far as it purports to give the companies the optional right to rebuild, it is, under the adjudications cited, in conflict with sec. 1943, Stats. 1898, and hence void. The difficulty with this contention is that, although in the form of a contract, yet each of the seven policies is in the terms expressly prescribed by the statutes. Secs. 1941–43 to 1941–62. It is the only form of policy which either of the defendants had the right to issue upon the property in question, and the only contract for such insurance which the parties had the power to make. Sec. 1941–64. The clause in the policy giving the defendants the optional right to rebuild was not made a part of the policy merely by virtue of the agreement of the parties, but also by the express command of the statute. *Hamilton v. Royal Ins. Co.* 156 N. Y. 336. This court has repeatedly treated and construed the standard policy as a statutory law as well as a contract. *Bourgeois v. N. W. Nat. Ins. Co.* 86 Wis. 606, 610; *Straker v. Phenix Ins. Co.* 101 Wis. 419; *Hobkirk v. Phœnix Ins. Co.* 102 Wis. 16. And *Vorous v. Phenix Ins. Co.* 102 Wis. 80, cited by counsel, is not in conflict with what has been stated. Being a law as well as a contract, its provisions were all binding upon the parties. One provision of the standard policy limits the liability of an insurance company to "the actual cash value of the property at the time any loss or damage accrues," "except when otherwise provided by statute;" and then provides that such liability shall "in no event exceed what it would then cost the insured to repair or replace the same with material of the like kind and quality." Sec. 1941–44, Stats. 1898. That is followed by the provision giving the optional right to rebuild, which declares that "It shall be optional, however, with this company to take all or any part of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality, within a reasonable time, on giving

notice within thirty days after the receipt of the proof herein required of its intention to do so; but there can be no abandonment to this company of the property described." Sec. 1941–44. Sec. 1943, as to the conclusiveness of the value of the property destroyed and the amount of loss and damage, must be construed in connection with these provisions of the statute, and, when so construed, there is no necessary conflict. It follows from what has been said that the several defendants, by electing to rebuild as stated, had the right to rebuild the hotel in accordance with the plans and specifications furnished by the plaintiff. It appears from the uncontradicted evidence that the defendants, and each of them, within a reasonable time, did rebuild and reconstruct such building in full in accordance with the plans and specifications thereof so furnished by the plaintiff, and that the building was fully completed by the defendants on or about August 25, 1900, and that the same was within a reasonable time. A verdict should have been directed in favor of the defendant.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

A motion for a rehearing was, on April 30, 1901, held to have been waived by failure to serve and submit the arguments within the time required by Rule XX of this court.

COLBURN, Appellant, vs. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY COMPANY, Respondent. 109 377 114 *323

February 8—February 26, 1901.

Practice: Objections to evidence: Purpose: Duty of court to indicate reason for ruling: Contracts: Breach: Damages: Evidence.

1. The purpose of objections to questions on the examination of a witness is not solely to enable the objecting party to insist on error in the appellate court, but is in part to enable the counsel who is con-

ducting the examination to avoid error and more effectually prove his case or defense.

2. Where counsel on either side is unable to comprehend the reason for excluding evidence, and in good faith appeals to the court to indicate specifically such reason in order that he may frame his questions in such a manner as to meet such ruling, it becomes the duty of the court to do so.

3. In an action to recover for a failure to leave the surface of a tract of land in a reasonably smooth condition in accordance with a contract by which defendant was given the right to remove dirt therefrom, evidence tending to prove the cost of removing an embankment thereon and filling holes and depressions therein, and putting the surface in a smooth condition, is *held* to have been improperly excluded.

APPEAL from a judgment of the circuit court for Dunn county: E. W. HELMS, Circuit Judge. *Reversed.*

For the appellant there were briefs by *E. B. & R. E. Bundy*, and oral argument by *R. E. Bundy.*

For the respondent there was a brief by *H. L. Humphrey* and *Pierce Butler*, attorneys, and *Thomas Wilson*, of counsel, and oral argument by *Mr. Butler.*

CASSODAY, C. J. This is an action for damages for the breach of a written contract under seal, executed and acknowledged by the plaintiff and the defendant, and duly witnessed March 14, 1899, wherein and whereby the plaintiff, in consideration of $250, to him in hand paid, granted, licensed, and permitted the defendant, its agents, contractors, and employees, to enter upon the S. W. ¼ of the N. E. ¼ of section 31, township 29 N., of range 14 W., in Dunn county, and excavate and remove therefrom all the earth and material from a strip of land 250 feet in width and 1,000 feet in length adjoining the right of way of the defendant on the north, and extending east 1,000 feet from the west line of the forty-acre tract, described; and it was therein mutually understood that the plaintiff only granted to the defendant the right to remove earth from the strip of land

described, and that such excavation should not be made below the level of ten feet below the railway track, and that the surface should be left in a reasonably smooth condition.

The complaint, among other things, alleges that the plaintiff had performed each and every condition on his part agreed to be performed by such written contract; that the defendant under and by virtue thereof entered upon the land, and excavated and removed dirt therefrom; that the new line of railway referred to had been completed, and the defendant had ceased to excavate from such land, and had stopped all work thereon and had removed therefrom; that the defendant had failed and neglected to perform the terms and conditions of the contract on its part to be performed, in this: that it had failed and neglected to leave the surface of the land where it had been so excavated in a reasonably smooth condition, but, on the contrary, left the surface in a very rough, uneven, and unsightly condition, and thereby greatly injured the land and the farm of the plaintiff adjoining the land and of which such land was a part; and claimed damages in the sum of $300.

The defendant answered, by way of admissions, denials, and counter allegations, to the effect that it had excavated and removed, from the land therein described, certain earth and material for the construction and improvement of its railroad; that the work referred to in the contract had been completed; that it had ceased to excavate from the land, and had stopped all work thereon; that it had left the surface of the land where it so excavated in a reasonably smooth condition.

At the close of the testimony, the jury, by direction of the court, returned a verdict in favor of the defendant. From a judgment entered thereon, the plaintiff brings this appeal.

The contract gave the defendant the right to "excavate and remove therefrom all the earth and material from" the

strip of land described, being 1,000 feet in length, east and west, and adjoining the defendant's right of way on the north, and being 250 feet in width, and the defendant therein agreed that such excavation should not extend more than ten feet below the defendant's railway track, and that the surface should "be left in a reasonably smooth condition." It stands confessed that the surface was not left in a reasonably smooth condition. On the contrary, it is admitted that a heavy and abrupt ridge ran along near the south side of the strip of land described, sloping more or less towards the north, and then rising more or less abruptly, and in some places nearly, if not quite, perpendicularly. Thus, it is in evidence that, at a cross section 740 feet from the west end of the strip, the bank rose abruptly from the comparative level to the height of twenty-one and one-half feet, and then sloped downward towards the north to ten feet and four inches above such level, and then rose almost perpendicularly to the height of forty-one feet and ten inches above such level. At another cross section 440 feet from the west end, the bank rose abruptly, and almost perpendicularly, from the comparative level to the height of sixteen and one-half feet, and then continued to rise quite sharply to the height of twenty-three feet and four inches above such level, and then descended abruptly to the north between four and five feet, and then, after going several feet at substantially the same height, it rose quite abruptly to the height of forty-one feet and three inches above such level. There are two other cross sections, one 270 feet from the west end and the other sixty feet from the west end, each of which presents quite an irregular surface, but not nearly as irregular and abrupt as the two described. These cross sections were taken from average points, neither the worst nor the best, and show the general contour of the surface, from the comparative level near the defendant's track towards the north,— not the uneven little small rolls of

ground, but the general contour. Such being the admitted conditions of the strip of land in question, located on the plaintiff's farm, it is difficult to perceive how the court could hold, as a matter of law, that the plaintiff had sustained no damage by reason of the breach of the defendant's agreement to leave the surface in a reasonably smooth condition.

But the case does not turn upon such ruling. The plaintiff had, as a witness, the county surveyor, who had followed surveying as a business,— an expert engineer, who had carefully examined the premises and made the measurements mentioned, and who had twenty years' experience as railroad contractor, mining surveyor, street commissioner, and otherwise, in removing and leveling dirt, removing embankments, and leveling or smoothing embankments of dirt, and who testified that he could make an estimate of the cost of putting this bank in any condition of smoothness that he had in mind; that he had made an estimate in regard to this land; that he figured on the cost of the removal of the bank between the track and the main bank, to make a slope of thirty-five feet to the hundred, and then, after going back a certain distance, cutting off the one bank so as to show such slope; that from his experience he was capable of making a correct estimate of the actual cost of removing the dirt and making such grade; that he took into consideration the cutting of the bank and filling in both ways, so as to have a slope of thirty-five feet to the hundred; that he knew what it was worth per yard to remove that soil,— cutting and filling as mentioned. The plaintiff's counsel put to such expert witness numerous questions, which were mostly excluded by the court. A few of them only will here be considered. Among the questions so excluded were questions to the effect: What, in your judgment, would be the cost of taking from this southern bank enough to make the grade there rise thirty-five feet in the hundred?

What, in your judgment, would it cost to place this land in such a condition of smoothness that a person with a team and farming tools could get onto it and drive over it? What, in your judgment, would be the cost of making that cut and the change so mentioned in your testimony? What is the cheapest way that the land could be put into such a condition that a person could drive onto it and over it? What is it worth per yard to remove the soil, cutting, and filling to construct a slope of thirty-five feet to the hundred? What would it cost per yard to make this cut and do this filling along the south bank, as you have described? What would be the cost per yard of making this cut off of the top of this second embankment in the manner you have stated, and of which you have made an estimate? What would be the cost per yard of removing this second embankment or cutting it in the manner you have stated? Do you know what it would cost per yard to remove or cut that embankment in the manner you have stated? Do you know what would be the easiest and most economical way of placing this piece of land over which this cut extends in such a condition that any use could be made of it? How much earth would have to be removed in order to put this piece of land in such a condition that it could be used for any purpose? Some of such questions were, in substance, repeated on the supposition of a slope of fifty feet to the hundred, and also twenty feet to the hundred, but were excluded. The only objection made to most of these questions was that they were incompetent, irrelevant, and immaterial. When such objection was made to one of such questions, counsel for the plaintiff requested the defendant's counsel to state more specifically the "grounds of his objection." The defendant's counsel then said that he thought the objection as stated was sufficient to protect the rights of the defendant, and the objection was sustained.

It should be remembered that the object of making ob-

jections is not for the sole purpose of enabling the objecting party to insist on error in the appellate court, but that one of the objects is to enable the counsel putting the questions to avoid error and more effectually prove his case or defense. We think the defendant's counsel should have been required to make more specific objections, if he had any; or, at least, have been required to state the theory upon which he regarded such questions objectionable. Upon sustaining one of such objections, counsel for the plaintiff appealed to the court to indicate specifically and in such manner "the ground and reason of sustaining the objection," that he might "form questions to meet the court's rulings." But the only response of the court was that "the objection goes to the foundation; if you will think about this matter a while, and think about putting in expert testimony on this question, I think you will see,"—to which statement and ruling the plaintiff duly excepted. We cannot sanction such a response of the court to such an appeal. True, counsel of the respective parties are expected to try their own side of the case, without the aid of the court. But when counsel on either side is unable to comprehend the ground or reason for excluding evidence, and in good faith appeals to the court to specifically indicate such ground and reason in order that he may frame his questions in such a manner as to meet such ruling, then, in our judgment, it becomes the duty of the court to indicate such ground or reason specifically. While a trial judge is not expected to become a partisan, yet he must preside and administer the law in such a way, as far as possible, as to secure the enforcement of justice. That, in our judgment, was not done in this case. While some of the questions mentioned, and several of those referred to, may be objectionable in form or substance, yet we must hold that evidence tending to prove the cost and expense of removing such embankment, and filling in holes and depressions, and putting the surface in a smooth con-

dition was improperly excluded. Of course, it is for the jury to finally determine what is "a reasonably smooth condition," within the meaning of the contract. But the evidence of the respective parties may be based upon different theories, slopes, and methods, each of which may have more or less bearing upon the question to be thus ultimately determined by the jury.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

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109 384
110 *158

BROWN, Administrator, Appellant, vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

February 9 — February 26, 1901.

Railroads: Injury to person at street crossing: Contributory negligence: Failure to look and listen: Unlawful speed: Constructive intent to injure.

1. If a person approaches a railway track to cross or enter upon it, ordinary care, as a matter of law, requires him, before doing so, to look and listen for a coming train, and, if there is one in plain sight or hearing, so circumstanced as to suggest reasonable probability of danger for such person to proceed, to discover such situation and not to go upon the track till the danger is past.
2. The rule above stated is absolute, so that a person about to enter upon a railway track is chargeable with knowledge of such dangers as he may reasonably discover by the use of his sense of sight and that of hearing. Neither violation of statutory regulations on the part of the railway company as regards the speed of its trains or signaling the approach thereof, nor any other negligent act on its part, nor mere diversion of attention on the part of the injured person, will excuse him from the performance of his duty to care for his own safety.
3. Failure on the part of a railway company to comply with statutory regulations as to the speed of its trains in running through a village, or failure to signal the approach thereof to a street or highway crossing, as the law requires, is negligence *per se*, but not

necessarily actionable negligence at the suit of one injured by such a train.

4. In the circumstances last above stated, the mere unlawful act does not constitute actionable negligence unless the injury be proximately caused thereby, without want of ordinary care on the part of the injured person, contributing thereto.

5. The mere intentional running of a railway train contrary to police regulations, designed to promote the safety of persons in crossing the track, does not constitute actual or constructive intent to inflict an injury upon such a person, so that if he is injured thereby he may recover compensation therefor regardless of his own contributory negligence.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the circuit court for Dane county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

Action to recover compensation for loss sustained by plaintiff's intestate, August Zilmer, through the alleged wrongful conduct of defendant's servants in running one of its passenger trains in the nighttime at an unlawful rate of speed across a public street in Deerfield, in Dane county, Wisconsin, a duly organized village of such county, without giving any signal of its approach to such crossing by sounding the engine bell or whistle, whereby the intestate, while attempting in the exercise of ordinary care, as claimed, to pass over the crossing, driving a single horse hitched to a light wagon, was injured so severely as to cause his death within a short time after the injury was received. The controverted issues on the pleadings were, mainly, whether defendant's servants were guilty of wrongful conduct causing the injury to Zilmer, if so guilty the degree of such guilt,—as to whether it was mere negligence or wilful misconduct,—and whether deceased was guilty of a want of ordinary care that contributed to the fatal result. On the trial the following appeared to be undisputed facts:

The place where the accident occurred was on one of the principal streets of the village of Deerfield. The time of

the accident was about 10 o'clock p. m. on the 29th day of August, 1895. Zilmer was a farm hand. He had driven into the village with several young girls as companions, in the early part of the evening. About 10 o'clock thereafter he started to return home with his party. The place of starting was from ten to twenty rods from where the accident occurred. The night was clear and not very dark, though there was no moonlight. About as the start was made, the train that caused the accident signaled its approach to the depot, which was near where the accident occurred, by sounding the engine whistle. Such signal was heard by many persons circumstanced no more favorably for that purpose than Zilmer. The train was a regular passenger train, due according to schedule time to pass through the village without stopping, at about the time Zilmer started on his way home. He was well acquainted with the situation of the railway tracks at the point where he was injured. From the place where he started as before stated, till he received his injury, according to all the direct evidence, he drove his horse on a slow trot without making any effort whatever to inform himself as to the approach of a train. As his horse was about to step upon the main track it was struck by the train, which was coming from the east, moving at from twenty to forty miles an hour, and he was fatally injured. The street crossed the railway track at about right angles. From the point where deceased started, to the region of the railway right of way, it was a little down grade. Zilmer's starting point was south of the railway crossing. There were three tracks. The first one reached was a side-track, located about fifty-two feet from the main track. About midway between such side-track and the main track was a second side-track. From the point where the traveled roadway crossed the first side-track, a person could see an approaching train from the east, on the main track, for a distance of about 630 feet. As

the train that did the injury approached, it made sufficient noise to attract the attention of persons within a radius of several hundred feet from the crossing. There was no opportunity, for one circumstanced as Zilmer was, to see the approaching train till he arrived at a point on or just over the first side-track. From that point on, until the main track was reached, a person looking east along the main track could see a coming train after it reached a point about 630 feet from the crossing. For that distance there was nothing to obstruct the view. Three young men were approaching the crossing a little ahead of Zilmer. All of them heard the engine whistle for the station, and the noise of the train a little before it came into sight, and, being on their guard against injury by it, they stopped before reaching the main track to allow it to pass. After they crossed the first side-track and were in the vicinity of the second, they observed the coming train. Zilmer was then just crossing the first side-track. They observed him at that instant, driving towards the main track, apparently regardless of the danger, and called out to acquaint him of the presence thereof. Some person from across the track also called a warning to Zilmer. He did not appear to notice any of the warnings. When nearly opposite the young men, one of them stepped towards the horse and called out "Whoa," but it was then too late to stop it. If Zilmer observed the train at all it was for only an instant before the collision. The appearances were that he was entirely unconscious of the danger till the accident occurred.

There was evidence tending to show that the 10:06 p. m. train customarily passed through the village at an unlawful rate of speed, and that there were no rules promulgated by the defendant inconsistent therewith. Also that if a train were moving at a rate of forty miles an hour there would not be sufficient time to stop it from the instant of its reaching a point where a person in the engine cab could observe

the track and the vicinity thereof up to the crossing to the instant when the accident occurred. There was some conflict of evidence as to whether the engine bell was sounded as the train approached the crossing.

The following is in substance the testimony of the three young men before mentioned: William Kroneman said: 'I heard the 10:06 p. m. train whistle just as we crossed the second side-track. We saw the train coming around the curve. At that instant I saw Zilmer coming back of us, and heard Quammen and Howe of our party call to him. The rig was then on the south side-track, coming at the rate of about six miles an hour. Zilmer did not appear to hear the warning my companions gave to him. He did not slacken the speed of his horse. The horse was trotting when I first observed him, and continued to trot right up to the instant the accident occurred.' Frank Howe said: 'I heard the whistle when I was at the south side-track. We saw the train coming when we were at the middle track, the second side-track. When we were a little further I saw Zilmer crossing the first side-track and I hollered at him. He did not appear to hear me, but allowed his horse to trot right up to the point where the collision occurred.' Herman Kruger said: 'I heard the noise of the train when I was a little way over the first side-track. I did not cross the main track till the train passed. At the time I heard the train Zilmer was coming about a rod and a half behind me. When the rays of the headlight showed on the rails of the main track at the crossing, Zilmer was still about a rod behind me and not quite clear of the first side-track. As the horse got about opposite me I took about three steps toward him and said "Whoa." There was not then time for me to stop the horse, so I stopped myself. The horse kept right on trotting up to the main track where he was struck by the train.' All the other direct evidence corroborated the three witnesses whose testimony has been given.

At the close of the evidence the court granted a motion for a nonsuit upon the ground that the evidence showed conclusively that Zilmer was guilty of contributory negligence. Judgment was thereafter rendered dismissing the complaint and for costs in favor of defendant.

For the appellant there were briefs by *Bushnell, Rogers & Hall*, and oral argument by *A. R. Bushnell.*

Edward M. Hyzer, for the respondent.

MARSHALL, J. Counsel contend that the evidence does not show contributory negligence as a matter of law. We shall not take time to follow the learned counsel in their ingenious reasoning on that point. The evidence is perfectly clear that the deceased had ample opportunity to discover the danger which resulted fatally to him, and that he drove his horse recklessly into it. He did not make any attempt to discover the coming train, though it must have been in sight when he was at least forty feet from the crossing. The evidence shows one of the most reckless attempts to cross a railway track, regardless of the danger which it in law and in fact suggests, that can be found in the books.

It is further contended that contributory negligence was not a defense, because the train that did the injury was running at an unlawful rate of speed and according to a custom of its servants known to and approved by it. It is argued that the injury to deceased, under the circumstances, should be considered as having been wilfully inflicted by defendant. What constitutes a wilful injury has been so recently fully discussed in this court that we do not feel justified in going over the subject at this time. *Bolin v. C., St. P., M. & O. R. Co.* 108 Wis. 333. There is no evidence here that the defendant saw the deceased in a place of peril and purposely or recklessly ran the train regardless thereof, nor that the train was operated with such an utter disregard of the safety of persons using the high-

way as to indicate a willingness to injure them. The evidence shows merely that the speed of the train was in excess of that allowed by law. That comes far short of showing actual or constructive intent to injure. The act was negligence *per se* (Elliott, R. R. § 1095, note 1; *Smith v. Milwaukee B. & T. Exchange*, 91 Wis. 360), but not necessarily actionable negligence. To constitute an actionable wrong, the conduct must be the proximate cause of an injury, without any want of ordinary care on the part of the injured person contributing thereto. There are a large number of cases in the books involving injuries to persons by railroad trains while being operated contrary to law, and it will be found that such a circumstance is uniformly held to be evidence of negligence, not of intent, actual or constructive, to injure. Elliott, R. R. § 1204; *White v. C. & N. W. R. Co.* 102 Wis. 489; *Schneider v. C., M. & St. P. R. Co.* 99 Wis. 378. In the latter case, the point upon which appellant's counsel mainly rely here was urged upon the attention of the court, viz., that where a person is injured by the act of another that is prohibited by statute, the latter is liable to the former for the resulting damages regardless of the question of contributory negligence. The unlawful act involved was that of running a railway train contrary to statutory regulations. The court decided that the legal restraint put upon a railroad company, as regards the running of its trains, does not relieve a traveler upon the public ways from the duty to use ordinary care for his own safety; that such restraint goes no further than to render the company refusing or neglecting to submit to it liable to the penalty imposed, and to the charge of negligence as a matter of law in a civil action, leaving a person injured by reason of such negligence remediless the same as in any other case of negligence if he contributes to his injury by his own want of ordinary care. It seems that we need not say more in this case.

By the Court.—The judgment is affirmed.

COOK and others, Appellants, vs. BELLACK, Respondent.

109 117

February 9—February 26, 1901.

Married women: Ownership of land: Obstruction of street: Responsibility of husband: Equity.

1. All the usual incidents and marks of ownership attach to and accompany the title of a married woman to real estate, the same as if she were unmarried; and if it be a dwelling house, in which she resides, the presence of her husband does not detract from her full possession and ownership.
2. In an action to compel the removal of a shed, etc., from an alleged public street, it appeared that the *locus in quo* was claimed by the wife of the defendant as part of adjoining premises belonging to her, and the only act of the defendant in connection therewith was to make repairs thereon as agent for his wife. *Held*, that the complaint was properly dismissed.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

The purpose of this action is to require the defendant to abate and remove a fence and a shed alleged to have been placed and maintained within the limits of a public street by defendant, and for a perpetual injunction restraining him from maintaining the same therein in the future. The street in question was alleged to be appurtenant to property owned by plaintiff. The answer alleged that the *locus in quo* was the property of his wife; that it had never been opened or used as a street, and that his wife and her grantors had been in the open and exclusive possession thereof for more than twenty years under claim of title in fee. The court found the facts with the defendant, and especially that he was not in possession of the disputed tract and made no claim or assertion of title or right to possession thereto; and, further, that said tract, since about the year 1869, had been in the continuous and adverse possession of Mrs. Bellack and her grantors. Other facts were found relative to the location, situation, and surroundings, which are not deemed

material. Judgment was entered dismissing the complaint, with costs, from which plaintiffs have appealed.

For the appellants there was a brief by *W. H. Lander* and *E. E. Brossard*, and oral argument by *Mr. Brossard.*

For the respondent there was a brief by *W. C. Leitsch*, attorney, and *W. S. Stroud*, of counsel, and oral argument by *Mr. Stroud.*

BARDEEN, J. Upon the general question of whether the findings are contrary to the evidence, we have no hesitancy in saying that there is evidence to support the facts found, and no clear preponderance against them. The finding that the defendant had no title and no possession of the place in controversy, and makes no claim thereto, is decisive against the plaintiffs. The title and possession is found to be in defendant's wife. Since a married woman may hold real estate in her own right, and may convey the same in like manner as if she were unmarried, there must attach to her title, and accompany it, all the usual incidents and marks of ownership. If the real estate be a dwelling house, in which she resides, the presence of her husband there as the head of the family cannot in the least detract from her full possession and ownership. *Mygatt v. Coe*, 152 N. Y. 457. So far as the maintenance of the shed is concerned, if it be admitted the place was a street, no liability rests upon defendant therefor. His only act in connection therewith was to repair it, as agent of his wife, after it had blown down. The fact that he uses it creates no obligation against him which may be enforced in this suit. The legal possession is with the owner, and she, and not her husband, is responsible for its maintenance. We agree fully with the conclusions stated by the trial court that the plaintiffs have no standing in a court of equity.

By the Court.—The judgment is affirmed.

TROGMAN, Respondent, vs. GROVER, Appellant.

February 9—February 26, 1901.

Constitutional law: Construction of statutes: Presumptions: Justices of the peace de facto: *Jurisdiction.*

1. In the construction of a statute no presumption arises in favor of either of two purposes in its enactment which are equally in disobedience of the constitutional duty of the legislature.
2. The original charter of a city (ch. 128, Laws of 1887) provided for the election of two justices of the peace, to hold office for two years, and to have the same powers, jurisdiction, etc., as justices of the peace of the several towns. By ch. 22, Laws of 1891, the charter was amended by increasing the number of justices to three, and their term from two to three years, that portion of the charter defining their jurisdiction, however, remaining unchanged. *Held*, that although the legislature is precluded by sec. 15, art. VII, Const., from conferring more than two years' terms upon justices of the peace, and has power, under sec. 2, art. VII, to create municipal courts limited in jurisdiction to the city, with terms of office in discretion, yet, it having no power, by a repeal of the only provision for the election of justices of the peace, to deprive the inhabitants of the city of the right to elect such justices, there is no presumption that the amendment of 1891 was an attempt to create municipal courts; and persons elected, qualified, and acting as justices of the peace under the amended charter are, *de facto* at least, such justices, with jurisdiction accordingly.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Affirmed.*

This was an action of forcible entry and detainer, the premises being situated, and the defendant resident and served, in the town of La Valle, in Sauk county. It was commenced before William Miles, called a justice of the peace, and upon affidavit of prejudice it was transferred, according to the docket of Miles, to "Horace J. Smith, next nearest justice of the peace of the county." It appears that both Miles and Smith had been elected to the office of justice of the peace under the charter of the city of Reedsburg as the same was amended in the year 1891, and were there

resident. The only question raised is whether the judgment is void by reason of the alleged fact that Smith and Miles were not justices of the peace for the county of Sauk. From judgment of the circuit court affirming the judgment of the justice in favor of the plaintiff, the defendant appeals.

For the appellant there was a brief by *Ed. C. Gottry*, and oral argument by *F. W. Hall.* To the point that an officer elected for a term of three years could not be a "justice of the peace" within the meaning of the constitution, and that it must be presumed that the legislature intended, by the amendment of 1891, to create municipal courts with jurisdiction limited to the municipality, they cited *Atkins v. Fraker*, 32 Wis. 510; *Att'y Gen. v. McDonald*, 3 Wis. 805; *Zitske v. Goldberg*, 38 Wis. 216, 234; *Jenkins v. Morning*, 38 Wis. 197; *Mathie v. McIntosh*, 40 Wis. 120; *Falk v. Goldberg*, 45 Wis. 94.

James A. Stone, for the respondent.

Dodge, J. The contention here is predicated upon questions of law. In 1887 the city of Reedsburg was incorporated by ch. 128 of the laws of that year, of which chapter sec. 5 provided that the officers to be elected by the people should be a mayor, treasurer, assessor, clerk, two justices of the peace, and two constables for the city at large, and three aldermen and one supervisor for each ward. Sec. 9 provided that all officers except justices of the peace should hold office for one year, and justices of the peace "for two years and until their successors are elected and qualified." Sec. 153 of the act provided that justices of the peace should have "all the powers, jurisdiction and duties, and shall be subject to the same liabilities and regulations, as are conferred upon and required of justices of the peace of the several towns of this state." In 1891, by ch. 22 thereof, four or five sections of the original charter were amended. Among others, sec. 5 was amended "so as to read as fol-

lows," the only change being *three* justices of the peace and *three* aldermen. Sec. 9 was also amended by a substitute "so as to read as follows," the principal change being, "Justices of the peace and aldermen shall hold their offices for three years and until their successors are elected and qualified." That act further provided for the election of a third justice of the peace at the election in the spring of 1891, and adjustment of terms between the three justices into one, two, and three years, by lot. Otherwise, at least as to the question before us, the charter remained unchanged. Both William Miles, before whom the action was brought, and H. J. Smith, before whom it was tried, were elected as justices of the peace at large for the city of Reedsburg, and duly qualified as such. The law required them to qualify by filing oath with the city clerk.

Appellant does not seriously contend but that, if Miles and Smith had been ostensibly elected and qualified as justices of the peace, as that term is used in the constitution and general statutes, and were so acting at the time the suit in question was brought, they would be *de facto* officers, so that their jurisdiction and judgment would not be void. Indeed, this question is so overwhelmingly supported by authority of this court and many others as to make assault upon it futile. *In re Boyle*, 9 Wis. 264; *In re Burke*, 76 Wis. 357; *In re Radl*, 86 Wis. 645; *McCormick v. Cleveland*, 98 Wis. 522. But appellant asserts they were not acting as justices of the peace in the ordinary statutory sense, but as some sort of municipal court officers of the city of Reedsburg. He predicates this contention upon the fact that the legislature, being precluded by sec. 15, art. VII, of the constitution from conferring more than two years' terms upon justices of the peace, but having, by sec. 2, art. VII, the power to create municipal courts limited in their jurisdiction to the city, with terms of office in discretion, it must be presumed that the legislature, in

amending the charter of Reedsburg, intended that which they could do, namely, to establish judicial officers of municipal jurisdiction under the designation "justices of the peace," who, of course, would not have jurisdiction against individuals or property outside of the city limits. *Mathie v. McIntosh*, 40 Wis. 120. The trouble with this argument is that it offers a dilemma, either horn of which convicts the legislature of disobedience of the provisions of sec. 15, art. VII; for, if the amendments to the charter above described have accomplished the purpose of creating new officers under the designation of "justices of the peace" who are not such, then thereby has been attempted to be repealed the old sec. 5, which was the only legislative provision authorizing the electors of the city of Reedsburg to elect constitutional justices of the peace. Such repeal is in contravention of the constitutional command to the legislature. *State ex rel. Wood v. Goldstucker*, 40 Wis. 124. There is no rule of statutory construction which raises any presumption in favor of either of two purposes, both of which are equally in disobedience of the constitutional duty of the legislature.

We are, therefore, left to consider the legislation amending the charter free from presumption as to intent such as appellant contends for. So considered, there cannot be two opinions. Officers theretofore designated as justices of the peace, and declared to have the powers of justices of the peace under general statutes, are continued in existence by name; the only difference being that one more is added, and that their terms are attempted to be enlarged to three years. The portions of the charter defining the jurisdiction of justices of the peace are left in force as before, and can have no application except to these particular officers, for there are no other "justices of the peace" whom the people of Reedsburg are authorized to elect. The conclusion is irresistible that both Miles and Smith had been

elected, and had qualified, and were acting as justices of the peace, and were such *de facto*, whatever may be true as to their *de jure* character,— a question to be raised by *quo warranto* or some other direct procedure, and not by attack on the validity of their judicial acts.

By the Court.— Judgment affirmed.

HUGHES, Plaintiff in error, vs. THE STATE, Defendant in error.

109 397
115 496

109 397
117 354

February 9 — February 26, 1901.

Criminal law and practice: Jurors: Qualification: Statements subsequent to verdict: Examination: Residence: Immaterial error: Murder: Dying declarations: Record: Presence of accused.

1. In a prosecution for the murder of a woman who was an inmate of a house of ill fame, a juror, when examined upon the *voir dire*, stated that he lived about two blocks from the saloon where the shooting occurred, and that he had read about the matter in the newspapers and heard some discussion about it, but had not formed an opinion, and thought he could try the case fairly. During the trial the attorney for the accused informed the court that said juror had been in said saloon soon after the crime was committed. Thereupon the court examined him and he admitted having been in the saloon as stated, but denied having learned anything in particular about the case. No question concerning his presence in the saloon as stated was put to him upon the *voir dire*. Upon motion for a new trial affidavits were introduced tending to show that said juror was a frequenter of the disreputable house where the deceased lived; that he knew and was intimate with her; that he had stated soon after the shooting that the man who did it ought to be sent over the road; and that he was in the room where the shooting occurred while the body of the deceased still lay upon the floor. The juror admitted that he was in the saloon building as stated and that he had been at said disreputable house, but denied having been in said room or having known the deceased. *Held*, sufficient to support the conclusion of the trial judge that the juror was competent.
2. A verdict in a criminal case cannot be impeached by anything a juror says or does after its rendition.

3. A person summoned as talesman is not disqualified by sec. 2525, Stats. 1898, from serving as a juror, by reason of having served upon the regular panel of a court of record in the same county within a year.
4. The fact that a person who has read about a crime in the newspapers states that, assuming the facts stated therein to be true, he has formed an opinion which would require evidence to remove, does not disqualify him from serving as a juror, if, notwithstanding said opinion, he thinks he can dismiss the impression and stand perfectly fair to the accused upon the evidence.
5. Questions which practically ask a juryman what he would or would not do under a supposed state of facts may properly be ruled out.
6. Where a person has a legal residence in the state, his statement upon examination as a juror that he has no *home* here, but lives at a hotel and is temporarily absent from the state a large part of the time, does not disqualify him.
7. Although twelve unchallenged jurors and no more should be in the box at all times while the jury are being examined, a failure in that regard does not constitute a material error, where it affirmatively appears that the error was corrected when attention was called to it, and that in the meantime nothing had been done except examine a juror without objection.
8. In a prosecution for murder evidence that on the day when the deceased made a statement tending to show that the killing was intentional, and prior to the time it was made, the deceased, although at times in a stupor, apparently understood what she was talking about, and conversed with others than the person to whom the statement was made concerning other matters requiring the exercise of memory and intelligence, stating to one person that she knew she could not get well and could not live long, is *held* sufficient foundation for the reception of said statement as a dying declaration; and the testimony of other witnesses that on said day the deceased was delirious and did not know what she was doing affects only the credibility of the statement.
9. The record on a trial for murder extending over several days affirmatively showed that the accused was present at the time of arraignment and plea, and at the opening of court, both forenoon and afternoon, on each day of the trial, up to and including the morning session at which the jury were charged and retired, and that he was present during the afternoon session of that day, both when the jury came in with a request for further instructions, and afterwards when such instructions were given. It also showed, under all reasonable inferences, that the jury came in and rendered their

verdict during the same afternoon session, and only a few minutes after receiving such additional charge. *Held*, a sufficient showing that the accused was present at the time the verdict was rendered.

ERROR to review a judgment of the circuit court for Douglas county: JAMES O'NEILL, Judge. *Affirmed.*

The plaintiff in error was convicted of the murder of May Bolz, and sentenced to imprisonment for life, and prosecutes this writ of error to reverse the judgment. The evidence showed that the accused was a young man twenty-five years of age, unmarried, and had been engaged about the railroad business, living in Superior, in what is known as the "Allouez Bay district," at the east end of that town; that for about a year and a half prior to October 3, 1899, he had been intimate with the deceased, who was an inmate of a house of ill fame in the city of Superior, in the Allouez Bay district, and that they had talked of being married; that the accused was out of work, and contemplated going to West Superior to obtain work in the railroad business, and, if he could not obtain employment there, talked of going West for that purpose; that the deceased knew of his plans with regard to leaving Superior; that the accused stayed with the deceased on the night of October 2d, and on the following day met her at about 2 o'clock in the afternoon at the saloon of one Barry, in the said district, and had some conversation with her about his plans, and whether she would accompany him. This conversation was held in a private wine room in the rear of the saloon, and, after it, the deceased came out, and joined some friends in another wine room, and a few minutes afterwards *Hughes* again called the deceased alone into another wine room, and, immediately after they had passed in, a number of shots were heard, and it was found that the deceased had been shot twice,—once in the right arm and once in the back, the last shot entering the sheath of the spinal cord, completely paralyzing the body from that point down; and that *Hughes*

had then shot himself four times. The evidence tended further to show that *Hughes* was accustomed to carry a rusty revolver, and that the deceased knew it, and that *Hughes* had oiled and loaded the revolver that day; but *Hughes* claimed upon the trial that the shooting was accidental; that as they passed into the wine room the deceased felt the revolver in his coat pocket, and told him he was careless; and he said, "There's nothing in it," and, not remembering that he had oiled and loaded it, pulled it out, pulled the trigger, and it went off, and she fell back, saying she was dying; and he then said, "If you are, you will not die alone," and turned it on himself. The deceased lived until October 11th, when she died, having made an ante-mortem statement on Sunday, October 8th. The plaintiff in error recovered from his wounds. There was little, if any, evidence of ill will between the parties, but some evidence that she refused to go to West Superior with the accused, as he wanted her to do.

John H. Vaughn, for the plaintiff in error, contended, *inter alia*, that if a juror serves upon the regular panel of any court of record within a year, he is absolutely disqualified from serving as a juror in any cause within the same county for one year, the exception being that if he has served during the year as a talesman or on a special venire he is not disqualified from again serving during the same year on the regular panel, or as a talesman, or on a special venire. *First Nat. Bank v. Post*, 66 Vt. 237. Where a juror positively says that he has an opinion which it will require evidence to remove, he is disqualified by reason of that opinion. Thompson, Trials, § 80; *People v. Mather*, 4 Wend. 229; *Eason v. State*, 6 Baxter, 466–476; *Comm. v. Knapp*, 9 Pick. 496; *Cotton v. State*, 31 Miss. 504; *White v. Moses*, 11 Cal. 68; *Fahnestock v. State*, 23 Ind. 231; *Stephens v. People*, 38 Mich. 739; *Rothschild v. State*, 7 Tex. App. 519; *Collins v. People*, 48 Ill. 145; *Gray v. People*, 26 Ill. 344; *Cancemi v.*

People, 16 N. Y. 501; *Olive v. State*, 11 Neb. 1; *Polk v. State*, 45 Ark. 165; *Palmer v. State*, 42 Ohio St. 596; *People v. Thacker*, 108 Mich. 652; *McGuire v. State*, 76 Miss. 504; *State v. Ramsey*, 50 La. Ann. 1339; *People v. Wilmarth*, 29 App. Div. 612; *People v. Fultz*, 109 Cal. 258; *State v. Rutten*, 13 Wash. 203; *State v. Wilcox*, 11 Wash. 215; *State v. Murphy*, 9 Wash. 204.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

WINSLOW, J. A claim is made on behalf of the plaintiff in error that the verdict is contrary to the law and the evidence, but we consider the claim so palpably unfounded that we shall not undertake to discuss it at length. It is sufficient to say that, in our judgment, there was ample evidence to sustain the verdict.

The specific errors claimed will be considered under three heads.

1. Errors in the selection and impaneling of the jury. Under this head a number of points are made. A juror named Sanow, when examined on the *voir dire*, stated that he lived about two blocks from the Barry saloon in October, 1899; that he knew something of the matter from reading about it in the papers, and from hearing some discussion of it, but had not formed an opinion, and thought he could try the case fairly. The juror was accepted, and the trial proceeded. During the progress of the trial, Mr. Vaughn, the prisoner's attorney, informed the court that he had just been informed that Sanow was at Barry's saloon soon after the shooting, and was very much excited and affected when he heard of it. Thereupon the court examined Sanow, and he testified that he was in the saloon shortly after the shooting, but did not learn anything in particular about the case, and formed no opinion. The ques-

tion whether he was in the saloon had not been put to him on the *voir dire*. The court then proceeded with the trial, Sanow remaining upon the jury. After the verdict, upon motion for a new trial, a number of affidavits of various persons were introduced tending to show, among other things, that Sanow was a frequenter of the house of ill fame where May Bolz lived, and that he knew and was intimate with her; that he had been heard to say, soon after the shooting, that the fellow who did it ought to be sent over the road; and that Sanow was in the wine room where the shooting took place fifteen or twenty minutes afterwards, and while the body of the deceased still lay on the floor. Sanow's testimony was taken, in which he denied substantially all of the facts alleged except that he admitted that he was in the saloon building, but not in the wine room, and admitted that he had been twice in the house where deceased lived, but denied knowing her. The court concluded on this evidence that Sanow's testimony was true, and that he was a competent juror. Upon a state of facts quite similar, a like ruling was sustained by this court in the case of *Schuster v. State*, 80 Wis. 107. The same case also disposes of another exception as to the juror Sanow. He was asked on cross-examination what he went to the sheriff's room for after the verdict was rendered, and an objection to the question was sustained. As held in the *Schuster Case*, the verdict cannot be impeached by anything which the juror said or did after the verdict was rendered.

Another juror, named Healy, was objected to as incompetent because he had served on the regular panel of the superior court within the year, and because he stated that he had formed an opinion in the case. Neither of the points is well taken. Healy was summoned as a talesman, and the very section which disqualifies a person from serving as juryman twice within a year excepts from the rule the case where a person is summoned as a talesman. Stats. 1898,

sec. 2525. As to his knowledge of the case, he said he had read of it in the newspapers, and that, assuming the facts stated in the papers were true, he had formed an opinion which would require evidence to remove; that notwithstanding this, he thought he could dismiss the impression and stand perfectly fair to the accused upon the evidence. The situation is substantially the same as that presented in *Baker v. State*, 88 Wis. 140, and for the reason there stated we hold that no error was committed.

Several jurors were asked whether, in case of a reasonable doubt in their minds as to the guilt of the accused, they would give him the benefit of such doubt, and whether they would give the accused the benefit of such a doubt as quickly as if the accused were a highly respectable gentleman; also whether they would be prejudiced against the accused if it developed that he was living with a woman not his wife, and whether they would follow their consciences or the judge's instructions; and other similar questions were put, all of which the court finally ruled out. There was no error in these rulings. While the questions might, perhaps, have been properly allowed, because the trial court has a large discretion as to the selection of a jury (*Sutton v. Fox*, 55 Wis. 531), the ruling of the court in refusing to allow them was clearly not error. They were questions which practically asked the juryman what he would or would not do under a supposed state of facts, and such questions may properly be ruled out. Thompson, Trials, § 102.

Objection is made to the juror Rogers because it is said his examination showed that he was not a qualified elector of this state. As to this it is sufficient to say that, while the testimony showed that he was away from the state a large portion of the time, it also showed that the absences were temporary, and always with the intention of returning. Stats. 1898, sec. 69, subd. 2. He was an unmarried man, and boarded at a hotel. It is true, that he stated that he

had no *home* here, but it is very evident that he meant by the word "home" a house or family residence. His other testimony showed him to have a legal residence here, and there was no error in allowing him to remain upon the jury.

Objection is made because at one time during the impaneling of the jury only eleven unchallenged jurors were in the jury box, and at another time there were thirteen in the box. The accused was not required to challenge at either time, nor were any proceedings had except that the examination of jurors was proceeded with, and, as soon as attention was called to the situation, the blunder was corrected. The true rule is that the full number of twelve unchallenged jurors should be in the box at all times while the jury are being examined. *Lamb v. State*, 36 Wis. 424. This rule is important, and should be strictly observed by trial courts; and, had the accused been required to challenge when there were less or more than twelve unchallenged men in the box, it may be that a serious question would be presented; but when it affirmatively appears that he simply examined a juror without objection, and that the error was corrected, and the required number supplied, when attention was called to the matter, and he was not compelled to challenge or exercise any right in the absence of the proper number, it must be held that he suffered no prejudice, and he must be considered to have waived the objection. *Flynn v. State*, 97 Wis. 44.

2. As to the alleged dying declarations of May Bolz, which the court received against objection and exception. This declaration was shown to have been made on the afternoon of Sunday, October 8th — three days before her death — to one Lontz. It will be unnecessary to detail here the substance of the statement further than to say that it tended to show that the shooting was intentional on the part of the accused, because the deceased had told the accused that it was all off between them. It appears quite clearly from the

evidence that the wound was so serious that there had been no hope of her recovery from the beginning. Before the declarations were received, there was evidence tending to show that the deceased on that day, and prior to making the statement, apparently understood what she was talking about; that several persons conversed with her besides the witness Lontz on matters requiring the exercise of memory and intelligence, such as the disposing of her belongings and her burial, and that she gave intelligent and conscious answers; that, although at times she seemed to be in a kind of a stupor, still, when her mind was aroused she was intelligent. This testimony came not only from the witness Lontz, but also from at least three other witnesses, two of whom were physicians, who saw and conversed with her on that day. In addition to these facts, Lontz testified that she told him that she knew that she could not get well and could not live long. This evidence was entirely sufficient as a foundation for the reception of the statement made. It tends to show that the statement was made while the deceased was intelligent and conscious, under the sense of impending death, which in fact soon took place. This satisfies the requirements of the law. *Miller v. State*, 25 Wis. 384; *Richards v. State*, 82 Wis. 172. The fact that other witnesses testified afterwards that she was delirious on Sunday, and did not know what she was doing, does not render the testimony inadmissible, but only affects the credibility of the statement.

3. The final objection made to the judgment is that the record does not show that the accused was present when the verdict was received, and hence, under the principles stated in *French v. State*, 85 Wis. 400, the conviction was erroneous and must be set aside. In that case the record did not show that the accused was present at any time during the trial, which lasted for several days, except when he was arraigned and pleaded; and hence it affirmatively ap-

peared that he was not present when the verdict was rendered, nor when sentence was pronounced. Under these circumstances it was held that the conviction was erroneous, that the record in capital cases must show the presence of the accused at the time of the rendition of the verdict and at the time of sentence, and that no presumption that the prisoner was present can be entertained if the record fails to show it. We shall test the present case by those rules. The clerk's record in this case shows that the trial began on November 23, 1899, and closed by the rendition of the verdict December 1, 1899. It affirmatively shows that the accused was present at the time of arraignment and plea, and at the opening of court, both forenoon and afternoon, on each day of the trial, up to and including the morning session of December 1st, at which time the jury were charged and retired. The record for the rest of the day reads as follows:

"In open court, December 1st, 1899, 2 o'clock p. m.

"*State of Wisconsin vs. William Hughes.*

"The jury, through Officer James Kane, intimated to the court that they desired to receive further instructions. Thereupon the court ordered the officer in charge to bring the jury into court. Jury appeared in open court at 4:20 o'clock p. m., and submitted two requests for instructions; defendant, *William Hughes*, defendant's attorney, John H. Vaughn, District Attorney Isaac Ross, and H. J. Loud, assistant district attorney, being present. Court ordered jury to retire, stating that it would take some time to prepare instructions as requested. Jury retired in charge of Officer Kane. Court ordered jury to be brought into court at 5:20 o'clock p. m., defendant, *William Hughes*, attorneys Vaughn, Ross, and Loud being present. The court further instructed the jury. Jury retires in charge of Officer Kane.

"December 1st, 1899.

"*State of Wisconsin vs. William Hughes.*

"Jury returned into court with the following verdict at 5:45 o'clock p. m.: 'We, the jury impaneled and sworn to try the issue in the above-entitled action, find the defendant guilty of murder in the first degree, as charged in the information. J. F. Huehle, Foreman.'"

The record then shows on December 4th and 5th following a motion for a new trial and the overruling thereof, and judgment on the verdict, at both of which times the accused was present.

The question is, Does the record, reasonably construed, show that the accused was present in court when the verdict was rendered? We think it does. It certainly is not essential that the clerk shall enter the fact of the prisoner's presence whenever a new witness is sworn or step taken in the case. If the record shows the presence of the prisoner at the opening of each session, with no intervening adjournments, it is quite clear that this is enough for that session. Thus, as a trial proceeds from day to day, with ordinary morning and afternoon sessions of court, the rule as to the record showing the presence of the defendant is satisfied if it shows his presence at the beginning of each session; not because any presumption is indulged in, but because the reasonable construction of the entry is, in the absence of anything to the contrary, that the prisoner was present during the session, and not simply at the moment the session began. Wharton, Cr. Pl. & Pr. § 551; *State v. Lewis*, 69 Mo. 92. Any other rule would require the clerk to be continually entering the presence of the defendant in order to keep jurisdiction. Now, in the present case it appears that the accused was present at the opening of the morning session when the jury was charged; that he was present during the afternoon session, both when the jury came in with their request and afterwards when they came in for further instructions. It also shows, under all reasonable inferences, that the jury came in and rendered their verdict *during that very afternoon session*, only a few minutes after they received the additional charge. We think the only reasonable and proper conclusion to be drawn from the record is that the prisoner was present during the entire afternoon session, during which session the verdict

was rendered, and that such conclusion does not require the support of any presumption.

There are no other assignments of error which require attention.

By the Court.— Judgment affirmed.

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GORES, Administrator, and others, Respondents, vs. FIELD, imp., Appellant.

SAME, Respondents, vs. MURPHY, imp., Appellant.

December 7, 1900 — March 19, 1901.

Banks and banking: Insolvency: Liability of officers for mismanagement: Action by creditors: Pleading: Joinder of causes of action: Limitation of actions: Clerical mistake in date: "Liability created by law:" Liability of cashier: Parties: Voluntary assignment.

1. In an action by creditors of an insolvent bank against its officers, a complaint stating a cause of action for the recovery of moneys of the bank negligently dissipated by defendants contained allegations to the effect that false statements as to the solvency of the bank were given out and published by defendants and that plaintiffs relied thereon in making their deposits. *Held*, that the purpose of these allegations was to give a full statement of the acts of the defendants in their management of the bank, rather than to state grounds for recoveries by plaintiffs individually on the ground of deceit, and that there was no misjoinder of causes of action.
2. An allegation, in such case, that "the legal liability of stockholders to contribute to the loss of said corporation has been enforced and paid," does not imply that any *action* to enforce the stockholders' liability has ever been brought.
3. The complaint also alleged that a certain defendant ceased to be a director of the bank February 23, 1893; that the bank made a voluntary assignment June 1, 1893; that the assignee duly qualified and entered upon his duties, and was still in possession of the assets of the bank; and that the plaintiff did not know the facts until the filing of the inventory, June 21, *1899*. Sec. 1697, Stats. 1898, requires the assignor to file an inventory within twenty days

after the assignment, and there was no allegation that such duty had not been performed. *Held*, that the complaint showed on its face that the date June 21, *1899*, was an error, and did not show that the action was commenced more than six years after the cause of action accrued.

4. Sec. 4252, Stats. 1898 (providing that actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a "liability created by law" may be commenced within six years after discovery of the facts by the aggrieved party), refers to liabilities created by statute law and not to common-law liabilities. *Hurlbut v. Marshall*, 62 Wis. 590, distinguished.

5. In an action against the officers and directors of a bank to recover for losses sustained by reason of their mismanagement, an allegation in the complaint that "by the negligence and want of ordinary care and diligence on the part of the defendants, *and each of them*, in the discharge of their duties as directors *and managers* of the bank" they permitted and allowed the funds and deposits therein and belonging thereto to be lost and said bank to be made insolvent," is *held* to include the cashier (who was not a director) as one of the delinquent officers, although many of the specific acts charged could ordinarily have been done only by the directors.

6. In an action by creditors of an insolvent banking corporation, which has made an assignment for the benefit of creditors, to recover from its directors and officers losses sustained by reason of their mismanagement, the assignee is a necessary party, but the corporation, which for all practical purposes has ceased to exist, is not.

7. In such a case it is not sufficient that the assignee of the corporation is individually a party, but he must be made a party in his official capacity.

APPEALS from orders of the circuit court for Milwaukee county: JAMES J. DICK, Judge. *Reversed.*

These are appeals from orders overruling separate demurrers by the appellants, *Field* and *Murphy*, to an amended complaint in the same action as that of *Gores v. Day*, 99 Wis. 276, and *Gores v. Elliott*, 108 Wis. 465. As stated in those cases, the action is one in equity, brought by a creditor of the Plankinton Bank, an insolvent state banking corporation, against the officers of the bank, to recover funds and property of the corporation alleged to have been

lost by the negligence and fraud of said officers in the management of the bank. The original complaint is sufficiently stated in the cases above referred to. After the commencement of the action and service of the original complaint, an amended complaint and summons were served in the action, by which the appellants, *Field* and *Murphy*, were added as parties defendant in the action, and some changes were made in the original complaint by way of addition and omission, although the allegations of the original complaint are, in the main, retained. So far as necessary to the consideration of the questions in this case, the changes in the original complaint may be briefly stated as follows:

In said original complaint it was stated that the directors of the bank, on the 1st of June, 1893, and for a long time prior thereto, were Frederick T. Day, James G. Jenkins, William Plankinton, F. W. Noyes, William H. Momson, and Charles L. Clason, but nowhere in said complaint was it charged that the defendant *Murphy* was an officer or in any way connected with said bank. In the amended complaint, however, the name of W. H. Momson as director is dropped out, and it is charged that the defendant *Field* was a director of said bank prior to the 23d of February, 1893, and that after February 23, 1893, the defendant *Elliott* succeeded the defendant *Field* as director. The amended complaint further alleged that the defendant *Murphy* was cashier of said bank from its organization to the 23d of January, 1893, and that he participated in various ways in the negligent management of the bank by its directors. The amended complaint charges the same acts of negligent and corrupt management by the officers of the bank as those charged in the original complaint, except that the allegation in the original complaint charging the unlawful payment of dividends is omitted. A new allegation is also contained in the amended complaint to the effect that the alleged fraudulent acts and doings of said defendants did not become known to the

plaintiffs until after the filing of the inventory of the Plankinton Bank by William Plankinton, assignee thereof, June 21, 1899, and could not, by the exercise of reasonable care, have become known to the plaintiffs, or any of them, prior to that time.

The demurrers were based upon the following grounds: first, that there is a defect of parties, in that neither the Plankinton Bank nor William Plankinton, as assignee, is made a party; second, that several causes of action have been improperly united; third, that the plaintiffs have an adequate remedy at law; fourth, that said action was not commenced within the time limited by sec. 4222, Stats. 1898; and, fifth, that no sufficient facts are stated to constitute a cause of action against either of the appellants.

C. T. Hickox, for the appellant *Field*.

For the appellant *Murphy* there was a brief by *Miller, Noyes & Miller*, and oral argument by *Geo. H. Noyes*.

For the respondents there was a brief by *Mock & Wittig, M. M. Riley*, and *J. G. Cox*, attorneys, and *Moritz Wittig*, of counsel, and a separate brief by *Joseph B. Doe*, of counsel, and oral argument by *Mr. Moritz Wittig* and *Mr. Doe*.

The following opinion was filed January 8, 1901:

WINSLOW, J. The amended complaint, to which the demurrers before us were interposed, contained the same allegations of official misfeasance and nonfeasance (with one immaterial omission) as those contained in the original complaint, which was passed upon by this court in the case of *Gores v. Day*, 99 Wis. 276. The grounds of demurrer which were considered and decided in that case were the general ground that no cause of action was stated, and the further ground that the court had no jurisdiction of the subject of the action. It was there held, in substance, that the complaint stated an equitable cause of action at common law, namely, an action by a creditor to enforce the right of the

corporation to compel corporate officers to account for and pay over to the assignee assets of the bank lost through their wrongdoing. This was the sum and substance of that decision, and we are entirely satisfied with the conclusions there reached upon the questions presented, and shall not re-examine them. There are, however, other questions now presented which require consideration.

1. It is argued that two causes of action have been improperly joined, namely, an action in equity to recover of bank officers moneys of the bank negligently dissipated, and an action at law for damages suffered by a depositor who was induced to deposit his money in the bank by deceitful representations as to its solvency. Were the premises of the argument correct, doubtless the conclusion would follow, because not only is the one an action in equity and the other an action at law, but the former is brought to enforce a right of action accruing to the bank, in which the recovery, if any, must go to the assignee for distribution, and the latter is brought to enforce a liability for damages to the individual creditor, caused by the deceit. *Killen v. Barnes*, 106 Wis. 546.

It is true that the complaint contains allegations to the effect that false statements as to the solvency of the bank were given out and published by the defendants, and that the plaintiffs relied thereon in making their deposits, and it is certainly true that these allegations would be pertinent and necessary in an action at law for deceit; but, viewing the complaint as a whole, we do not regard them as introduced in this action for the purpose of claiming individual recoveries by the plaintiffs on that ground, but rather as historical in their nature, and simply as intended to fully place before the court a full statement of the acts of the defendants in their management of the affairs of the bank. Such was, in effect, the conclusion reached in the case of *Gager v. Marsden*, 101 Wis. 598, where similar allegations

were contained in the complaint, although the effect of the allegations in question is assumed and not discussed in the opinion.

2. It is argued that the complaint shows that an action has already been brought to close up the affairs of the corporation, and therefore that no subsequent action can be maintained; citing *Foster v. Posson*, 105 Wis. 99, and *Cunningham v. Wechselberg*, 105 Wis. 359. The allegation relied upon is as follows: "That the legal liability of stockholders to contribute to the loss of said corporation, as plaintiffs are advised and believe, has been enforced and paid." It is sufficient to say, as to this contention, that it does not imply that any *action* to enforce the liability of stockholders has ever been brought. The stockholders may have discharged their liabilities upon demand and without action, and such payment would properly be alleged as an enforced payment. Even if the allegation in question implied the bringing of an action, it would not necessarily follow that such action was a winding-up action.

3. The defendant *Field* insists that the complaint shows that more than six years has elapsed since the cause of action accrued against him, and hence that it is barred by sec. 4222, Stats. 1898. The complaint alleges that *Field* ceased to be a director February 23, 1893. Another allegation of the complaint is to the effect that the plaintiffs did not know the facts until the filing of the inventory of the bank by William Plankinton, the assignee, to wit, on the 21st of June, *1899*. Hence it is argued that the complaint, on its face, shows that the action could not have been commenced until after June 21, 1899, or more than six years after *Mr. Field's* official connection with the bank ceased. The difficulty with the argument is that the complaint shows on its face that the date of June 21, *1899*, is an error. The complaint shows that the voluntary assignment of the bank to Mr. Plankinton was made June 1, 1893, and that the assignee duly quali-

fied and entered on his duties, and was still in possession of the assets of the bank when the complaint was drawn. The statute requires the assignor to file its inventory, certified by the assignee, within twenty days after the assignment (Stats. 1898, sec. 1697), and there is no allegation that such duty was not performed. How it could be delayed for six years is certainly not apparent. We think that no such effect can reasonably be given this allegation as the appellant claims; that it must be considered a clerical error, and hence can furnish no basis for a conclusion as to when the action was commenced. So concluding, we cannot say that there is anything on the face of the complaint to show that more than six years has elapsed since the cause of action accrued and before the action was commenced against *Mr. Field.*

In this connection a contention made by the respondent should properly be noticed to the effect that the statute of limitations properly applicable to this action is not sec. 4222, Stats. 1898, which is the general six-year limitation statute, but rather sec. 4252, which provides, in substance, that actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or enforce a liability "created by law" may be brought within six years after discovery of the facts by the aggrieved party. We are satisfied that the words "liability created by law" refer to a liability created by statute law, and that, as the liabilities attempted to be enforced in this action are common-law liabilities, the section cannot be held to apply. Such was the ruling upon a statute identical in terms in New York. *Brinckerhoff v. Bostwick*, 99 N. Y. 185. See *State v. Grove*, 77 Wis. 448.

4. It is claimed in behalf of the defendant *Murphy* that the complaint does not charge him with any act of mismanagement by which the assets of the bank were lost. *Murphy* was not a director of the bank, but simply cashier; and it is

certainly true that many of the acts charged,—such as allowing the defendant Day to have control and management of the bank,—are acts which, ordinarily at least, could only be done by the directors; but there are some allegations in the complaint, which, though very general in their nature, we think must be reasonably construed as charging that moneys of the bank were lost by the negligence of the cashier. One of these allegations is to the effect that, "by the negligence and want of ordinary care and diligence on the part of the defendants, and *each of them*, in the discharge of their duties as directors *and managers* of said bank, and inattention to its affairs, permitted and allowed the funds and deposits therein and belonging thereto to be squandered and lost, and said bank made insolvent," etc. We think this allegation must be held to include the cashier as one of the delinquent officials.

5. There remains to be considered the single question whether there is a defect of parties by the nonjoining of the corporation itself or the assignee as a party defendant. In considering this question the nature of the action must be remembered. It is not an action to recover property of the plaintiff, but an action to enforce rights of the banking corporation against its officers, and allowed to be brought by the plaintiff simply because the proper officers of the corporation either actually or virtually refuse to bring it. The recovery, if any, becomes part of the assets of the corporation, and goes to the assignee. *Gores v. Day*, 99 Wis. 276. Logically, the corporation should be made a party to such an action, and must be an indispensable party where the corporation is in fact a "going concern," and the recovery, if any, will go into the corporate treasury. 2 Pomeroy, Eq. Jur. (2d ed.), § 1095; *Land, L. & L. Co. v. McIntyre*, 100 Wis. 245–256. It is believed that this has been the uniform practice in such actions, and for the palpable reason suggested above, namely, that the cause of action which is being

enforced is the cause of action of the corporation, and the moneys received will go to the corporation as trustee for its members, subject, of course, to the rights of creditors, if any such rights exist.

The reason for the rule disappears, however, when it appears, as in the present case, that the corporation, for all practical purposes, is defunct. While not, perhaps, legally dissolved, the allegations of the complaint show that it has ceased business for years, that all its property and property rights have passed to its assignee, and that the recovery here, if any, must go to the assignee, to be distributed under the order of the court, and can never reach the corporate treasury. These considerations effectually remove from the case the necessity of the presence of the corporation, which at best is now little more than a name; but they call all the more loudly for the presence of the assignee of the corporation, who must administer the fund recovered, and we cannot but regard his presence in the action as indispensable. It is true that William Plankinton, who is alleged to be the assignee, is a party to the action in his personal capacity; but we cannot regard this as sufficient. The test must be whether a judgment in the action would be binding and conclusive upon Mr. Plankinton's successor in office. Manifestly, it would not as the action is at present constituted. It would be dangerous to hold that a judgment in an action to which a person is made a party simply as an individual would be binding on such person as a public officer, and upon his successor in office. We therefore conclude that the assignee of the bank in his official capacity is a necessary party to the action, and that, not having been made a party, the demurrers should have been sustained.

By the Court.—The orders appealed from are reversed, and the action is remanded with directions to sustain the demurrers.

BARDEEN, J., took no part.

Motion by the respondents for rehearing were submitted for the appellants on a brief by *Miller, Noyes & Miller*, attorneys for *Murphy*, and *C. T. Hickox*, attorney for *Field*, and for the respondent on a brief by *M. M. Riley*, *Moritz Wittig*, and *Joseph B. Doe*, of counsel.

To the point that the assignee is not a necessary, and not even a proper, party to an action to enforce the liability of directors and other corporate officers for neglect of duty, counsel for the respondents cited *Frost v. Citizens' Nat. Bank*, 68 Wis. 234; *Kyes v. Merrill F. Co.* 92 Wis. 35; *In re Gilbert*, 94 Wis. 108; *Farnsworth v. Wood*, 91 N. Y. 308; *Bank of Niagara v. Johnson*, 8 Wend. 645; *Gainey v. Gilson*, 149 Ind. 58; *Runner v. Dwiggins*, 147 Ind. 238, and cases cited; Angell & A. Corp. § 312; *Greaves v. Gouge*, 69 N. Y. 154; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *Maxwell v. Northern T. Co.* 70 Minn. 334.

The following opinion was filed March 19, 1901:

WINSLOW, J. Upon motions for rehearing made by respondents in these cases, we are asked to review and reverse that part of the former decision which holds that the words "liability created by law," in sec. 4252, Stats. 1898, refer to liabilities created by statute law alone, and it is said that, by so holding, we have overruled the decision in the case of *Hurlbut v. Marshall*, 62 Wis. 590. We have given the point careful consideration, but are not convinced that we have erred, nor are we convinced that *Hurlbut v. Marshall* has been overruled. In that case the meaning of the words, "made liable by law," in sec. 3221, R. S. 1878, was under consideration, and it was held that they included all statutory and common-law liabilities. This holding was based upon the evident intent shown in that section, and the other sections in immediate connection therewith, that all legal liabilities of the officers or stockholders of a

banking corporation to its creditors should be settled in one action in equity.

As to the meaning of the words, "liability created by law," in sec. 4252, however, none of these considerations applies. This section is a part of the chapter on limitations of actions, and stands by itself. It simply declares that the chapter "shall not affect actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a liability created by law," etc. That the law named in this section is statute law seems to us quite clear. The law referred to is one which imposes a forfeiture or creates a liability. Forfeitures are only imposed by statute law. We see no occasion to retrace our steps on this question of construction, nor do we think that the case of *Hurlbut v. Marshall* has been in any respect overruled.

We are asked by respondents to decide what statute of limitation is applicable to the cause of action stated in the complaint. This seems a question of some difficulty, and as it has not been adequately argued, and its decision is not necessarily called for upon the complaint as it stands, we refrain from expressing an opinion on the question.

By the Court.—Motions denied.

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ILLINOIS STEEL COMPANY, Respondent, vs. BILOT and wife, Appellants.

December 10, 1900 — March 19, 1901.

Waters: Title to lake bed: Patents, when void: Public trust: Adverse possession: Artificial filling: Ejectment: Riparian rights: Elements of actual possession: Statutes construed: Usual improvement: Hunting and fishing.

1. Land covered by the waters of lakes or ponds, or by water partaking of like character as regards public rights, though in form conveyed by a federal or state patent, is vested in the state the same

after such conveyance as before, such conveyance, as to such land, being absolutely void.

2. The title to land of the character mentioned, in the territory out of which the state of Wisconsin was formed, prior to such formation, was in the United States in trust to preserve to the people of prospective states the enjoyment of the waters covering the same to the line of ordinary high-water mark, to the same extent as tidal waters are enjoyable by the rules of the common law. When this state was admitted into the Union such trust as to such land within the boundaries devolved upon it and there remains, for it is powerless to divest itself of the trust so far as its preservation is necessary to maintain in all its integrity the character of such waters.

3. The presumption as regards land covered by water of the character above indicated is that the trust mentioned attached thereto before the government survey was made, and that the extension of such survey over and the conveyance of such land in form was void; or that a trust of a like character attached to the land by reason of the shore line being extended by erosion.

4. No title can be obtained, by adverse possession for twenty years, to land held by the state in any capacity.

5. The title to land held by the state in trust to preserve to the people thereof the enjoyment of lakes and ponds does not change by artificial filling so as to raise the surface above the level of the water.

6. Adverse possession of land covered by water, which is the subject of private ownership, may be acquired by any means which actually and notoriously exclude the true owner therefrom, effectually disseising him thereof. Other means than physical exclusion by residence thereon or by inclosing the same will accomplish it.

7. The mere ownership of the shore, where title stops at the water's edge by reason of the public character of such water, does not entitle one to maintain ejectment to obtain possession of land beyond the water's edge.

8. Private interests in land, if there be any below the line of ordinary high-water mark of public waters, is *prima facie* incident to the ownership of the shore, and if title to the latter be divested from one by adverse possession, the interests which are incidental thereto pass with it.

On motion for rehearing:

9. A *prima facie* paper title in plaintiff, established in an action of ejectment, does not entitle him to recover as a matter of law in the face of evidence tending to show that the premises in controversy are not subject to private ownership because of being part of the bed of a lake.

10. Though the government survey and plat of premises in controversy shows them to be upland, and the mapping thereof into lots and blocks by a person claiming to be the owner indicates the same, the physical situation, as to whether such premises are or are not a part of the bed of a lake, will prevail.
11. It is not necessary that a particular locality should be wholly covered by water constantly, or be covered sufficiently to be susceptible of navigation, to give thereto the character of a lake bed as regards title thereto. If a body of water is not a river, yet is reasonably constant in character, it is a pond or lake, and the limits thereof are the natural shore though water does not constantly stand at that point.
12. If a plaintiff in ejectment establishes *prima facie* paper title to the *locus in quo*, he is not entitled to recover as a matter of law in the face of evidence tending to show that the premises are submerged by water and are appurtenant to a shore the title to which has been divested from the true owner, so called, by adverse possession.
13. The elements of actual possession necessary to draw to it constructive possession, when an adverse claim to real estate is founded on color of title under sec. 4211, Stats. 1898, are the same as actual occupancy under sec. 4213, as construed by sec. 4214, though the evidence deemed sufficient to establish occupancy under the latter sections may not be so deemed under the former, the circumstance of color of title being of itself significant as to the nature of the possession.
14. The only substantial difference between adverse possession under sec. 4211, Stats. 1898, and such possession under sec. 4214, is that under the former actual possession is extended by construction to the limits of the land described in the paper conveyance or judgment constituting the basis of color of title, while under the latter the adverse claim is limited by the actual adverse occupancy.
15. When unexplained actual occupancy for the requisite length of time has been clearly established, either under sec. 4211, Stats. 1898, or secs. 4213, 4214, the presumption of seisin in the true owner within such time disappears, and the presumption that the requisites of adverse possession have been complied with by the occupant arises under sec. 4210.
16. No particular kind of inclosure, nor any inclosure, is required to establish adverse possession as a matter of fact under sec. 4214, Stats. 1898; but if such an inclosure is relied upon to establish such possession as a matter of law, it must be of a substantial character, though not necessarily artificial, so as to be effective as a protec-

tion against outside interference in adapting the premises to some suitable use.

17. If a *usual improvement* is relied upon to establish adverse possession, an inclosure of any character, partly or wholly marking the boundary claimed, or any other method of clearly defining such boundary, accompanied with circumstances satisfactory to a jury to establish the essential facts, is sufficient.

18. A *usual improvement*, within the meaning of sec. 4214, Stats. 1898, does not require improvement of the land in value, but any actual use thereof to which it is adapted and to which the owner or one claiming to be the owner might reasonably devote it. Occupation of a locality for a burial lot, or some other purpose that would partially or wholly destroy its value, may be as effective an improvement as any other, according to the circumstances.

19. What will constitute actual possession in the sense of being a usual improvement of real estate within the meaning of sec. 4214, Stats. 1898, varies according to the character of the land, its location, and all circumstances bearing on the question. That there must be a *usual improvement*, where that is relied upon, is a matter of law; what is such an improvement is a matter of fact.

20. Continued, exclusive, notorious use of premises covered by water for the purpose of hunting and fishing, with other circumstances, may tend to establish adverse occupancy so as to carry a case to the jury, under proper instructions, to say whether there was such an occupancy as to constitute disseisin of the true owner.

21. Actual occupancy of premises, so as to indicate at every instant of time, by mere observation, the extent of the hostile use, is not necessary to satisfy sec. 4214, Stats. 1898. It need be only such continuous, exclusive, hostile use as in the judgment of the jury, under all the circumstances, is sufficient to notify the true owner, actually or constructively, of the invasion of his rights and the actual extent thereof.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action in ejectment. The complaint was in the usual form. The answer contained a plea of the twenty-year statute of limitations. Sec. 4207, Stats. 1898. The defense thus pleaded was the one relied upon on the trial. To maintain plaintiff's case evidence was produced showing *prima*

facie record title in itself of a portion of two lots in fractional section 33, township 7, range 22 E., and competent evidence that such portion includes the premises in dispute.

The evidence on the part of defendants was to the following effect. In 1872, theretofore, and thereafter, except as artificially changed, the territory called "Jones Island," which includes the premises in controversy, was covered by the waters of Lake Michigan. The water was quite shallow in many places and in others was as much as nine feet deep. A man by the name of Truher, at the time specifically stated, had a house on the submerged territory, supported in some way in the shallows or resting on a piece of made land. Just how that was does not clearly appear. He pretended to exercise dominion over the entire territory, and, so pretending, he prevented any person from locating thereon without his permission. He sold his house and claim of title to one Jacob Muza in 1872, making no paper transfer of the property, however. There were then about nine settlers on the island. He made a verbal transfer of the house and authorized his grantee thereof to exercise the same control that he had over the entire territory. Muza took possession of the house and such possession of the territory as was practicable under the circumstances, and continuously thereafter asserted dominion over the same, and enforced his claims by preventing any person from locating thereon without his permission. Evidence was given showing the precise condition of the territory in 1872, theretofore, and thereafter, except as artificially changed, as follows:

Muza testified that when Truher gave him the property it was all submerged by water and mud as deep as over his head; that when he gave defendant permission to locate, the particular place allotted to him was covered by water so that it was of no use until artificially raised above the level of the water. A witness, Jones, testified that the en-

tire territory was covered by water in 1855; that sail and fishing boats used to go right through what is now the center of the island; that it was all submerged with water, but that it was deeper sometimes than at others. One Zelin testified that the premises claimed by defendant, before they were filled, were covered with water from four to eight feet deep; that defendant was three or four years filling up the property, and that some part of the territory is still covered by water. Witness Kunka testified that he built a house on the island, by permission of Muza, in 1872; that he bought thirty feet from Muza's house; that the whole territory was then covered with water from four to ten feet deep; that it was all marsh and water till filled. Defendant testifies that Muza pointed out to him the place which he might occupy, and that he commenced filling up some thirteen years before the commencement of the action; that when he commenced to make the fill it was all covered with water to a depth of several feet; that he got a small piece of filled territory of one Zelin, and that he worked out from that in filling what Muza permitted him to occupy; that he commenced filling his lot as soon as he got permission from Muza, and soon after built a house thereon, which he occupied thereafter all of the time down to the commencement of the action.

At the close of the evidence the court directed a verdict in plaintiff's favor in accordance with the prayer of the complaint. A judgment was accordingly entered establishing title in fee to the property in plaintiff, with all the incidents of such a title, and according to the statute in such cases.

For the appellants there was a brief by *Fiebing & Killilea* and *M. C. Krause*, and oral argument by *O. J. Fiebing*.

For the respondent there was a brief *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*. To the point that adverse possession was not established, they

cited *St. Croix L. & L. Co. v. Ritchie*, 78 Wis. 492; *Taylor v. Rountree*, 28 Wis. 391; *Ladd v. Hildebrant*, 27 Wis. 135; *Austin v. Holt*, 32 Wis. 478; *Mission of the I. V. v. Cronin*, 143 N. Y. 524; *Wheeler v. Spinola*, 54 N. Y. 377; *Thompson v. Burhans*, 61 N. Y. 52; *Miller v. Long Island R. Co.* 71 N. Y. 380; *Thompson v. Burhans*, 79 N. Y. 93; Anderson, Law Dict. IMPROVE and IMPROVED LANDS; Cent. Dict.; Bartlett, Dict. of Americanisms, 309, 310; Webst. Dict.; 10 Am. & Eng. Ency. of Law, 241, 242; *Ross v. Smith*, 1 Barn. & Adol. 911; *Clark v. Phelps*, 4 Cow. 190; Newell, Ejectment, 697, sec. 1; id. 707, sec. 10; id. 715, 716, sec. 20; Wood, Limitations, §§ 257-259; *Price v. Brown*, 101 N. Y. 669; *Ely v. Brown*, 183 Ill. 525; *Roberts v. Baumgarten*, 110 N. Y. 380; *Roe v. Strong*, 119 N. Y. 322; *Jackson v. Woodruff*, 1 Cow. 277; *Jackson v. Schoonmaker*, 2 Johns. 230; *Barr v. Potter*, 57 Ky. 478.

The following opinion was filed January 8, 1901:

MARSHALL, J. We understand the statement which appears in the record, as to the proof of title upon which plaintiff rested its claim and secured the judgment appealed from, to mean this: A record was exhibited which purported to show that the United States or the state of Wisconsin, most likely the former, prior to 1872, made a patent, in form conveying to private ownership a certain government subdivision of land within and according to the public land survey; that such title as was thus acquired was by mesne conveyances vested in plaintiff before the commencement of this action; and that the premises in controversy are within the boundaries of such government subdivision according to such survey. That proof made out a *prima facie* title. The case seems to have been tried and decided upon the theory that it was sufficient to entitle plaintiff to recover unless defendants were able to show a better title by adverse possession.

The learned counsel for respondent, evidently assuming that the actual possession of lands submerged by water, necessary to satisfy the requisites of adverse possession so as to gain title in that way, is difficult if not impossible, encouraged defendants' witnesses to make it appear as clearly as possible that when the adverse possession in controversy commenced, and for a long time thereafter reaching up to within about thirteen years of the time of the commencement of the action, the particular land in question was covered by water from three to nine feet deep; that such was its condition when appellants took possession thereof; and that there had been no change in that regard except by artificial filling.

There is evidence tending to show that there was some dry land within the territory over which Muza assumed dominion in 1872. But the indications are that the greater part of such territory was then covered by the waters of Lake Michigan or of an arm of the lake partaking of its character, or by some expanse of water governed by the law relating to the title to the beds of lakes and ponds, and that the premises in question were formerly a part of such submerged land. Now, if such indicated facts are the truth of the matter, the land belongs to the state of Wisconsin regardless of whether the United States or the state has in form transferred it to private ownership. The law in that regard is too well settled to warrant any discussion of it here. This court has been over the whole subject many times in recent years. The title to the beds of all lakes and ponds, and of rivers navigable in fact as well, up to the line of ordinary high-water mark, within the boundaries of the state, became vested in it at the instant of its admission into the Union, in trust to hold the same so as to preserve to the people forever the enjoyment of the waters of such lakes, ponds, and rivers, to the same extent that the public are entitled to enjoy tidal waters at the common law. A patent

from the United States, so far as it purports to cover any of such lands, whether made before the state was admitted into the Union or thereafter, is ineffectual. It has been so repeatedly held. A government patent of land bordering on a lake or pond, regardless of the boundaries thereof according to the government survey, does not convey title to the lands below the line of ordinary high-water mark. The United States never had title, in the Northwest Territory out of which this state was carved, to the beds of lakes, ponds, and navigable rivers, except in trust for public purposes; and its trust in that regard was transferred to the state, and must there continue forever, so far as necessary to the enjoyment thereof by the people of this commonwealth. Whatever concession the state may make without violating the essentials of the trust, it has been held, can properly be made to riparian proprietors. Under that, by long-established judicial policy, which has become a rule of property, a qualified title to submerged lands of rivers navigable in fact has been conceded to the owners of the shores. Otherwise the title to lands under all public waters is in the state, and it is powerless to change it. It cannot transfer such title by grant or otherwise, nor can title thereto be obtained by adverse possession, at least unless such adverse possession shall continue for the term of forty years. Hence we must presume from the evidence that the title to the land in dispute is where the evidence tends to show it is. We should say in passing that the term "qualified title" as above used refers to that interest in the beds of navigable streams which has passed to private ownership according to the uniform holdings of this court,—a full title, subject to the public rights which were incident to the lands forming such beds at the time of the creation of the trust above mentioned. No private ownership has been conceded which displaces or materially affects such public rights. As to them the state has not abdicated and cannot abdicate its trust.

There is no need of enlarging on this matter. As before indicated, this court has in recent years several times declared the law as here stated, grounding such declaration upon indisputable principles and the law as laid down on the subject by the supreme court of the United States. *McLennan v. Prentice*, 85 Wis. 427; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534; *Ne-pee-nauk Club v. Wilson*, 96 Wis. 290; *Willow River Club v. Wade*, 100 Wis. 86; *Pewaukee v. Savoy*, 103 Wis. 271; *Barney v. Keokuk*, 94 U. S. 324; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387; *Yates v. Milwaukee*, 10 Wall. 497.

So plaintiff's *prima facie* title was overcome by the evidence tending to show that the premises in question were naturally a part of the bed of Lake Michigan, or some arm or bay thereof, or some body of water having the incidents of a lake; and the verdict should not have been directed in plaintiff's favor. If the fact be that such is the natural character of the land, plaintiff cannot maintain ejectment therefor in any event, even if it shall establish ownership of the natural shore, though, of course, in such circumstance, it would not be without remedy for any wrong to it not common to the public. *Austin v. Rutland R. Co.* 45 Vt. 215; *Coburn v. Ames*, 52 Cal. 385; *Gray v. Bartlett*, 20 Pick. 186; *Stockham v. Browning*, 18 N. J. Eq. 390.

What has been said regarding plaintiff's title requires a reversal of the judgment in any event, for it can only recover on the strength of its own title, not on the weakness of *Bilot's*. However, it is deemed best to correct some erroneous ideas that seem to have influenced the direction of the verdict as bearing on appellant's claim of title. If it shall finally turn out that the premises in question were not originally a part of the bed of Lake Michigan, nor of any expanse of water partaking of the character of a lake as regards the title to the bed thereof, but were part of the bed of navigable waters of such a character that a qualified title

thereto passed to the owner of the shore as an incident thereof, then they are subject to the law of adverse possession. And if in such circumstances Muza, under whom *Bilot* claims, maintained from 1872 until *Bilot* took possession of the premises a condition which disseised the true owner, and *Bilot* continued that condition so as to cover the full period of twenty years, his title is governed by the principles declared in *Illinois S. Co. v. Budzisz*, 106 Wis. 499, and the settled law on the subject.

It is not true, as seems to have been supposed, that adverse possession of the premises was impossible while they were covered by water. Notwithstanding such condition the true owner may have been disseised, and that was all that was necessary to start the limitation period running. Any act or acts sufficient to destroy the true owner's dominion over the property, whatever its character, is a disseisin, within the meaning of the limitation statute. 3 Washb. Real Prop. *495. Physical exclusion by an inclosure of the property of some kind is by no means necessary; neither are the requisites of sec. 4212, Stats. 1898, essential. *Wilson v. Henry*, 40 Wis. 594; *Lampman v. Van Alstyne*, 94 Wis. 417. It has been held that evidence of the mere taking of seaweed to the exclusion of all others is sufficient proof of disseisin to carry a case to the jury on that subject. *East Hampton v. Kirk*, 84 N. Y. 215. Actual, visible, hostile appropriation of the premises to the exclusion of the true owner in any way satisfies all the requisites of disseisin, and that condition may be created by any means that entirely exclude the true owner from the property. It does not require constant residence of the appropriator on the property. Private interest in submerged land of the character we are discussing, *prima facie* at least, exists only as an incident of title to the bank or shore. He who is in actual possession of that is constructively in possession of everything that is incident thereto. If possession of the former

ripens into title, the title to the latter goes with it. Gould, Waters, § 37, and cases cited in the notes.

Applying the principles last stated to the evidence as to defendants' title, it is easily seen that the case in that respect should have been submitted to the jury even upon the trial court's theory as to plaintiff's title. There was evidence tending to show that for more than twenty years before the commencement of this action the person holding *prima facie* government title had been, in the right now claimed by *Bilot*, disseised thereof. There is evidence tending to show that Muza, from 1872 till *Bilot* commenced the artificial change of the property, exercised such dominion over the same as to prevent any person from enjoying it in any way except by his permission. Such evidence tends to show more than a mere claim of dominion. That clearly would be insufficient. It shows that there were physical acts of prohibition, so that Muza's claim was notorious, recognized, and submitted to, and that such acts were accompanied by actual occupation and enjoyment of the beach or dry land adjoining, if there was any. In the face of such evidence, plaintiff was not, in any phase of the case, entitled to the direction of a verdict, but the cause should have been submitted to the jury under proper instructions.

It is hoped that on the next trial of this case all the facts will be clearly brought out in the light of all the legal principles applicable thereto, and that such principles will be kept clearly in view; also that the precise location of the property in dispute will be shown, so that it can be identified with reference to the original shore line and the present shore line. That there was a failure, upon the trial we have reviewed, in respect to the matters referred to, is most clear. That has rendered it impracticable for us to lay out a definite line for future guidance in the case. The assumption that plaintiff's title was good originally, merely because it came from the government, and the assumption that, merely be-

cause the land was submerged, it could not be held adversely, and the further assumption that actual possession was necessary independent of actual possession of the shore, all seem to have had influence with the trial court.

By the Court.—The judgment of the superior court is reversed, and the cause remanded for a new trial.

BARDEEN, J., took no part.

A motion for a rehearing was duly submitted in this case and was decided March 19, 1901, the following opinion being filed:

MARSHALL, J. The argument on the motion for a rehearing has received that consideration which the learned counsel for respondent earnestly invoked for it, without our being able to indorse the reasons assigned for changing the judgment entered, though such reasons are urged with such earnestness and confidence that a departure from the usual course in disposing of such matters, by filing an opinion pointing out what appears to be the weakness thereof, seems advisable.

As a preface to what we shall say it seems proper to make a few observations in respect to the right attitude of counsel, so unfortunate as not to have their side of a controversy viewed here as they view it, on the first presentation of their case, in measuring the situation in which the adverse judgment places them and solving the question of whether a further effort here should be made or not. The situation of counsel at such a time, especially where great interests are involved and the decision disappoints hopes born of a careful study of a subject, is well suited to test to the utmost that power of calm consideration of the reasons and authorities, supposed to lead up to and require the adverse decision, necessary to enable a person to give due weight thereto.

But, as said on a similar occasion (*Brown v. C. & N. W. R. Co.* 102 Wis. 151), whether counsel stand the test or not, the duty of this court to carefully and dispassionately reconsider a determination of old questions in the light of old and new reasons, and to do the same as to any new point advanced which was overlooked by counsel on the first presentation, uninfluenced by any other consideration than that of a desire to discover and pronounce the law correctly, remains the same. It is hoped and believed that the learned counsel's second argument has received that consideration. Whether such argument indicates that it was presented and guided by the state of mind necessary to properly weigh an adverse decision may best be judged by the reasons advanced to disturb it and the support thereof pointed out for consideration.

The opening pages of counsel's argument are devoted in the main to a personal vindication and a vindication of the trial court, the excuse being kindly made at the start, for the treatment of the case by this court which calls for such vindication, that it was characterized by haste as a result of press of business. Whatever the motive of the learned counsel — and we will not indulge in the idea nor doubt at all but that it was worthy — the intimation that the case did not receive proper consideration here because of press of business, though made and repeated in such a way as to challenge reflection, is one that a person, conscious of the full scope of its meaning, will not make at all unless he desires to say that judicial duty has not been properly performed. We are safe in saying that counsel does not intend to say that. Yet, as it seems, haste, strictly so called, in work so important, is not excusable by pressure of business. It is not understood here that pressure of business is any excuse for a hasty consideration and disposition of the rights of any one. If that supreme virtue, charity, moved counsel to assign the weight of the burden resting *here* as an excuse

for haste, it should be understood that there is no one *here* who believes that the mantle of such virtue reaches far enough to accomplish counsel's purpose. *Here* is centered the last hope of every party conceiving himself aggrieved in a trial court for the ultimate attainment of justice, and every one *here*, it is believed, is fully conscious of that fact and aims to labor with the deliberation and patience and industry and courage necessary to discover and determine the truth both as to the law and the fact, blind to the effect thereof upon counsel or courts that had first to do with the matter, or the effect upon particular parties, whether high or low, devoting all the time requisite to that end, unconscious, for the time being, of any interfering burden. The learned counsel whose work we now have before us, being thus informed, will of course not ground the reargument of a case hereafter upon any assumption of excusable haste by this court in deciding it at first.

Counsel complain because in the former opinion it was suggested that on the next trial an effort be made to establish all the facts that are material in the light of the legal principles discussed, and that such principles be kept clearly in view from the beginning to the end of the trial; that the particular location of the property in dispute be indicated with reference to the original and present shore line of Lake Michigan. They say much evidence was introduced showing that plaintiff's title was *prima facie* perfect, from the government, and that it was so stated in appellant's bill of exceptions. Why was that not sufficient? we are asked, and why should all the evidence have been put into the record, which would have resulted only in showing what was admitted, that is, that plaintiff's evidence established a *prima facie* title? If there were any doubt that the admonition complained of was proper and advisable in the interests of a speedy and just determination of this litigation, and that the profit that may probably flow from

attention to it is certainly as valuable to respondent as appellant, counsel's course of reasoning above indicated would remove it. A study of the former opinion seems not to have impressed upon the mind of counsel the fact, as it is, that there was no criticism whatever of respondent's *prima facie* case. There was no intimation that counsel was not diligent and thorough, nor that the learned trial court did not give due weight to the evidence bearing on that question. There being no criticism in that respect, there is no need for any vindication of either counsel or the court. It was proper to leave out of the bill of exceptions the record evidence showing respondent's *prima facie* case and to supply its place by an admission of the fact. Full credit was given to that admission in the decision rendered. The difficulty is that the significance of evidence produced by appellant and drawn from his witnesses by the cross-examination pointing to the probable existence of facts inconsistent with the *prima facie* case, was overlooked on the trial, overlooked on the argument in this court, and, if we fully understand now the argument on this motion, the same indications are yet present. No one will dispute that the paper title from the government *prima facie* showed that respondent was entitled to recover. But if there was evidence tending to show that the territory included in the government survey and patent, instead of being dry land, was covered by a part of the waters of Lake Michigan, then the trial court, on the motion for the direction of a verdict in plaintiff's favor, was bound to hold that the jury might find that such was the fact and that plaintiff's *prima facie* title was thereby overthrown. Again, if there was evidence tending to show that the *locus in quo* was appurtenant to the bank of a river which had been adversely possessed so as to take the title thereto from the holder of the paper title, the court, on the motion to direct a verdict, was bound to hold that the jury

might find the facts in defendant's favor, necessary to that result.

Counsel complain that we failed to give them and the court due credit for legal learning, and that we assumed that they did not know that private ownership in the bed of a lake cannot be acquired from the government. As we understand the contention it is this: Respondent's counsel having produced evidence making out a *prima facie* case, there was no need to consider the subject of the disability of a private person to acquire title to the bed of a lake, so it is unjust to counsel to assume, because they paid no attention to that matter, that they were not possessed of all the legal knowledge applicable thereto. Of course there was no purpose in the opinion to reflect on the legal ability of court or counsel. We hold both in the highest esteem; but that cannot militate against speaking of cases as they are presented to us by the record, however eminent counsel or court may be or who may be connected therewith. Probably there has not yet been counsel so eminent or court so learned but that mistakes have occurred, and such situation will undoubtedly continue. That is clearly demonstrated by the following.

Of course counsel fully understand that a person cannot acquire private ownership in the bed of a lake, yet they insist that when a mere paper title is made to what appears to be dry land by the government plat and the government patent, such appearances are conclusive on the question of title, overlooking the fact that it has been decided over and over again, by this and other courts, that it is the physical fact of whether patented land is in a lake or not that governs. If it is shown upon the government plat to be land and it is sold as such, but in fact it is within the boundaries of a lake, the paper purporting to convey title thereto is a nullity. That is elementary. A large number of cases are cited to it in the former opinion. We will not add to them

here. So if we acquit counsel for not bearing in mind that a person cannot become the owner of the bed of a lake, they make it more probable than before that on the former trial it was not borne in mind that a mere paper title to territory that is in fact a part of a lake, even if the pictured representation thereof made in the government land-office shows it to be dry land, must fall before the physical situation that it is in a lake.

The subject above discussed has been sufficiently treated, but counsel may think their argument on the motion for a rehearing has not received consideration in detail if we omit to refer to their suggestion that we could have obtained considerable light on their position by attention to the first forty-five pages of their printed argument, which, it is assumed by counsel, we did not study. That assumption is right. Counsel's argument covered fifty-two pages. The first forty-four related to matters not covered by the assignments of error. That came about by the preparation of respondent's brief without the benefit of appellants' brief. As the case was finally submitted, all of the argument of respondent's counsel, except about seven pages, was entirely eliminated from the case, and we were no more called upon to examine it than to examine their brief in some other case. But if we had taken the time to read the whole argument, the only influence it could have had, if any, would have been to confirm our impressions that the significance of the physical condition of the premises in question, in respect to whether covered by the waters of Lake Michigan or by water partaking of the characteristics of a lake as to the title to the bed thereof, or covered by water adjacent to a shore adversely held, was overlooked.

We are appealed to by counsel to draw on all the resources which we can properly take judicial notice of, notwithstanding omissions to bring the same to our attention. The answer to that is that the actual, physical situation of

the premises in question cannot be controlled by maps or plats. If what was the bed of the lake has been platted as dry land, the platting does not affect the title. If, as before indicated, land has been pictured on government plats as land, which was in fact in a lake, the fact governs, not the mapping of the territory by the government.

It does not seem that we are called upon to discuss the evidence which we said raised the question of whether the premises in dispute were a part of the bed of a lake. We did not pretend to give the evidence of witnesses word for word, but to state the effect thereof,— not the conclusive effect by any means, but the effect as a court must view it in determining whether the direction of the verdict was proper. We were bound, as of course the trial court was, to give appellant the benefit of the most favorable inferences that could reasonably be drawn from the evidence. All the facts which such inferences pointed to, we were bound to consider as established and verities in the case, because the jury would have had a right to so decide had they been permitted to do so.

We will make a few references to the testimony at this time for the purpose of supporting the views expressed above. Counsel say this court said that Jones testified that the entire territory was covered with water in 1855; that if by "entire territory" Jones Island is meant, the court entirely misapprehended the witness's testimony. It is evident counsel views the evidence from the standpoint of the favorable inferences it will bear for respondent, while we view it in the light of the most favorable inferences it will reasonably bear for appellant. There is the trouble. The witness said: "The condition of the island in 1855, it was pretty nearly a marsh. The mill was very small and it occupied very near the whole of it. The condition of the island compared with what it was in 1855, it is not hardly the same place. There is much more land now than there was then. In 1855 sail-

boats went by way of the cut right over the center of the island. The soil on either side of that cut was all sand, not marsh in through the cut. That was washed in there, but marsh all around it though pretty near. When the wind was off the lake the marsh would be submerged in water. There was some water on there all the time, but it would rise and fall." Now it seems that a fair inference from that evidence is that in 1855 substantially all of the island, except a small place large enough to locate a mill upon, was covered by water. Sometimes it was shallow, so as to have the appearance of a marsh or swamp, and at other times it was so submerged as to hide those indications. The water raised and lowered with the lake, said the witness. A witness by the name of Kunka testified that in 1872 he went onto the island and there was marsh grass there; that the water would rise and fall; that the water was from two to three feet deep; that there was marsh grass growing there. In its natural state, unaffected by any disturbing causes, the water was flowing. Sometimes the water would be still and other times not. "The time I first came there, there was no solid ground on the island whatever." This question was asked the witness: "When you came there how much water was there on the average, spread over the island?" to which he answered, "It was in places seven feet, eight feet, nine feet, and ten feet, the shallowest point about four feet and probably five feet. It was that way all over the island." Again the witness said: "It is true that those people who are living on Jones Island when they came there filled up a part and built on it. The business of all living on the island when I went there was fishing, and in order to get to their houses they would have to go in boats." There are other indications in the evidence, too numerous to mention in view of what was said in the former opinion, that what the witness called a marsh or swamp was covered with water, not deep enough, however, when the lake

was at rest, so but that vegetation which commonly grows in shallow water appeared on and above the surface. Muza called the territory where *Bilot's* house was located a swamp, and yet the water was said to be from three to six feet deep according to the condition of the water in the lake. *Bilot* said he floated the material to his place to fill with, and went to and from it in a boat. Muza said that when he went to the island it was all swamp, marsh, mud, and water as deep as over a man's head; that in the locality of *Bilot's* place the water was sometimes still and sometimes flowing; that it depended upon the lake; that most of the time the water was still. The evidence is replete with indications that the water on the marsh, so called, was lake water, not river water; that it had very little if any movement indicating a river, and that the indications of the characteristics of a lake were sufficient to warrant a jury, under proper instructions, in finding that the territory in question was formerly lake bed.

From the foregoing it seems that all said in the former opinion as to the evidence presenting questions of fact that should have been solved by a jury under proper instructions, is fully sustained by the record. Was the territory in question originally a part of the bed of a lake or pond, or part of the bed of a river? The mere fact that the water was very shallow, so that marsh grass appeared above the surface, that it was called a marsh, and that the water was not deep enough to admit of navigation, or that the surface was not at all times wholly submerged, does not preclude its being in fact a lake. All those conditions existed in *Nepee-nauk Club v. Wilson*, 96 Wis. 290, yet it was held there that the territory in dispute was a lake. Size or depth of a body of water, it was there said, does not solve the question of whether it is a lake or river. If the land in question was inside of the natural shore of Lake Michigan, or of any body of water not a river, so that water did not merely beat upon it as a shore, but covered it, or if the land was covered by

water, not a part of Lake Michigan, yet not a part of a river, manifestly plaintiff never obtained title thereto through or under the patent from the government.

Complaint is made because, in the statement of facts upon which the former opinion was based, it was said that Truher pretended to exercise dominion over the entire territory, and prevented any person from locating thereon without his permission. Notwithstanding the confident assertion of counsel that there is no such evidence in the record, either in a literal sense or within the range of reasonable inferences, we still think that, on the whole, what was stated and is so criticised is a fair inference from the testimony of Muza. Certainly Truher, according to Muza's evidence, pretended to own the island. He was living there when Muza came upon the scene. He asserted the right of dominion over the island. He pretended to sell and deliver possession thereof to Muza, asserting at the time that no one could take it from him but Lake Michigan. The difficulty seems to be, as before indicated, that we look at the evidence in the most favorable light it will reasonably admit for appellant, while counsel for respondent view it from the standpoint of the most reasonable inference to be drawn therefrom in its favor. That the latter is not the correct method of testing the record to determine whether the direction of the verdict was proper, need not even be stated.

A few words now in respect to what counsel say on the subject of adverse possession, and we are done. If there is anything in the former opinion indicating that there can be constructive adverse possession of land so as to disseise the true owner, without its being based on a written instrument, and actual possession of part of the premises included in it, we do not know where it is. We said that physical exclusion of the true owner is not necessary to adverse possession, nor is compliance with sec. 4212, Stats. 1898. That is certainly true, but it is also true that there must be an

inclosure or usual cultivation or improvement of the property adversely claimed, so as to indicate the boundaries of the adverse claim, and that such claim cannot be extended beyond the actual occupancy. That is the common-law rule and the rule of the statutes as well. Secs. 4213, 4214, Stats. 1898. It is also true that all presumptions are in favor of the true owner, and that such presumptions must prevail until overcome by clear proof of continuous disseisin of the true owner for the complete statutory period. But such presumptions do not reach further. The statutory period being completed and satisfied by clear proof of the actual occupancy required, the presumption is turned in favor of the adverse occupant, and it does not make any difference whether the adverse holding was under a written instrument or not. True, there is a distinction between adverse possession under sec. 4211 and such possession under secs. 4213 and 4214. But when that distinction is satisfied, sec. 4210, Stats. 1898, rules the situation. That provides that in every action to recover real property, or the possession thereof, the person establishing the legal title shall be presumed to have been seised of the property within the time required by law, and the occupation thereof by another deemed subordinate thereto unless it appears *that the premises have been actually possessed for the full period necessary to the acquisition of title in that way under some other provision of the statutes.* Disseisin under sec. 4212, of an entire tract of land, may be accomplished by actual possession of a part of it. Such possession will carry, by construction, possession of the entire tract described in the written instrument of conveyance or the judgment forming the basis of the claim of title. Disseisin under secs. 4213 and 4214 can only be accomplished by and to the extent of actual occupancy, the boundaries thereof being indicated by a substantial inclosure of some kind, or cultivation or improvement *in the usual way.* No particular kind of inclosure is

requisite. It may be artificial in part and natural in part. Nor is any particular kind of an improvement required, so long as it satisfies what is usual under the circumstances and indicates clearly the boundaries of the adverse occupancy. That is the definite, positive, and notorious *pedis possessio* of the common law, and of the statute (sec. 4214, Stats. 1898) as well,—the actual possession characterized by an inclosure, or by such use as is usual for such land. There is no difference between the statutory requisites of such adverse possession and the common-law rule. The former is but a fair declaration of the latter. If one relies upon an inclosure to support a claim of adverse possession, an artificial inclosure is not necessary. The boundaries may be artificial in part and natural in part if the circumstances are such as to clearly indicate that the inclosure, partly artificial and partly natural, marks the boundaries of the adverse occupancy. *Becker v. Van Valkenburgh*, 29 Barb. 319; *East Hampton v. Kirk*, 84 N. Y. 215; Tyler, Ejectment, 888. If improvement of the premises is relied upon to mark the boundaries of the adverse possession, it need not necessarily be an actual improvement of the property in value, as the learned counsel for respondent seem to indicate. The term "improvement in the usual way" as used in the statute means put to the exclusive use of the occupant, as the true owner might in the usual course of events. That use may be, as it often is, one that adds nothing to the value of the premises. It may even destroy the natural and actual value, as, for instance, a highway may be acquired by twenty years' uninterrupted adverse use. No one would claim that it would improve the property in the particular lexiconic sense of the word which counsel seem to apply to it as used in the statute. The right to flow land may be acquired by twenty years' continuous, hostile use thereof for that purpose, though the result be to destroy the value thereof. Putting land to the exclusive use of the claimant for collec-

tion of seaweed is held to be evidence of adverse use, and a usual improvement of land adapted to that purpose. So held in New York, where the statutes are the same as ours. *East Hampton v. Kirk, supra; Clancey v. Houdlette*, 39 Me. 451. In *Archibald v. N. Y. C. & H. R. R. Co.* 157 N. Y. 576, the term "improvement" was treated as synonymous with "use," the court saying: "It cannot be said as a matter of law upon the evidence in the record that any one was in the actual possession or occupation of the parcel during the period of twenty years prior to the commencement of the action. The land was not inclosed or cultivated or *put to the exclusive use of any one.*"

It must be borne in mind that the distinction between adverse possession under color of title and such possession without that color, is this: In the former the actual possession, by presumption of law, is constructively extended to the limits defined in the paper conveyance or judgment which gives color to the claim of title; while in the latter, adverse possession is bounded by the actual adverse occupancy. The essential elements of actual adverse possession are substantially the same where there is color of title and where there is not, though on the question of fact, of whether a possession has the essentials of adverse character requisite to disseise the true owner and start the statute of limitations running against him, particularly the element charging him with notice of the hostile invasion of his right, more persuasive evidence is required in the latter case than in the former. Sedgwick & W. Trial of Title to Land (2d ed.), § 731. So the use, by appellants' counsel and this court, of judicial authorities where the adverse claim was based on color of title in support of the proposition that the evidence in this case required the facts involved to be found by the jury under proper instructions, was legitimate. It shows no disregard of the statutes (secs. 4213, 4214, Stats. 1898), but is in perfect harmony therewith. The actual adverse oc-

cupancy that will draw to it, as a matter of law, constructive occupancy under sec. 4211, is in law and in fact within the scope of the term "protected by a substantial inclosure," or "usually cultivated or improved," used in sec. 4214. Whether such occupancy exists in any given case, if to be determined from evidence susceptible of reasonable conflicting inferences, is for the jury to say. The learned trial court, and counsel for respondent as well, recognized that, but, as it seems, it was not correctly applied, because the bearing which the nature of the premises in controversy has in determining the truth, was overlooked, or there was a misunderstanding of the meaning of the term "usually improved" as used in sec. 4214; or due consideration was not given to the fact that reasonable means of knowledge of an adverse claim, and the extent of it, is as effective, in the law governing the subject under discussion, as actual knowledge. What will constitute adverse possession of land not susceptible of being devoted to any profitable use, might not, necessarily, of agricultural land or any other susceptible of being so devoted. What would be effective for that purpose as to lands wholly or partially overflowed by water, might not as to a building lot in a city. What would satisfy such purpose in respect to a marsh or swamp, not usually put by the owner to any other use than that of a hunting and fishing ground, might not as to premises of any other character. The governing questions of law, regardless of the character of the premises, are the same in every case, but the question of fact may be presented by evidence in such a great variety of ways, according to the circumstances of each particular case, that usually there is room for conflicting inferences, requiring the verdict of a jury as to where the truth lies. The true doctrine, recognized by all courts and text writers, was declared by the United States supreme court in *Ewing's Lessee v. Burnet*, 11 Pet. 41, 52, speaking by Mr. Justice BALDWIN, as follows:

"To constitute an adverse possession there need not be a fence, building or other improvement, and it suffices for the purpose that visible and notorious acts of ownership are exercised over the premises in controversy for the time limited by statute. So much depends upon the nature and situation of the property, the uses to which it can be applied or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule in all cases. But it may safely be said that where acts of ownership have been done upon the land, which from their nature indicate a notorious claim of property in it, and are continued sufficiently long with the knowledge of an adverse claimant without interruption or an adverse entry by him; such acts are evidence of an ouster of a former owner and an actual adverse possession against him, provided the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held. Neither actual occupation, cultivation nor residence are necessary where the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership such as he would exercise over property which he claimed in his own right and he would not exercise over property which he did not claim."

We should remark in passing, lest the above declaration appear to conflict with sec. 4214, that the facts that gave rise thereto indicate clearly that the term "improvement" was used in the restricted sense of some profitable use or physical change increasing the value of the premises, instead of in the broad sense of devoted to any use for which the premises are adapted, the sense in which the term "usually improved" is used in our statute; and that the words "actual occupation" were used in the restricted sense of appropriated by the location of some structure thereon, instead of the broad sense of any use constituting actual possession and appropriation for any purpose the land is adapted to, the sense in which the term "occupied" is used in sec. 4213 as construed by sec. 4214.

In the instant case there is some evidence that the prem-

ises in controversy were subjected for the requisite length of time to the use which they were best adapted to, and a usual use, and that the acts in that regard were notorious. How, then, can we say as a matter of law that the essentials of adverse possession did not characterize Muza's conduct? It is not difficult to say generally what, as a matter of law, constitutes adverse possession; but what will evidence the necessary facts, so as to warrant saying that they exist in any given case, is quite another matter. The question of adverse possession is one "compounded of law and fact, and every case in which it is involved must be determined by its own circumstances. What is adverse possession is one thing in a populous country, and another thing in a sparsely settled one, and still a different thing in a city or village." *Draper v. Shoot*, 25 Mo. 197. In *Sauers v. Giddings*, 90 Mich. 50, there was no color of title. The adverse claimant used the premises yearly as a hay meadow and for grazing purposes, and he planted some trees thereon. On such facts it was held that, whether they indicated the legal requisites of adverse possession as a fact, was a jury question. In *Clark v. Potter*, 32 Ohio St. 64, discussing the same subject it was said:

"As the character of the possession depends on the nature and situation of the property, and the use to which it can be applied or to which the owner may choose to apply it, it is evident that resort must be had to the usual and ordinary conduct of owners of such land to determine if it is sufficient. If the possession comports with ordinary management of similar lands by their owners, it furnishes sufficient evidence of adverse possession."

A large number of cases might be cited to support the views above expressed. It is believed that they are so elementary that further reference to authorities is unnecessary. They lead to this: Occupancy of land necessary to adverse possession under sec. 4213, Stats. 1898, need only be such actual possession as the subject of it is adapted to under the

circumstances of the particular case and such as is reasonably sufficient to attract the attention of the true owner and put him on inquiry as to the nature and extent of the invasion of his rights. If an inclosure of itself is relied upon to establish occupancy it must be of a substantial character in the sense of being appropriate and effective to reasonably fit the premises for some use to which they are adapted. If an improvement of the premises is relied upon, any actual visible use to which similar premises are usually devoted may be sufficient, whether the result be to increase or decrease the same in value, or destroy the natural value entirely. Occupancy for a burial lot is as effective as occupancy for the purposes of a costly structure. An inclosure having no purpose of physical exclusion of outside interferences — a mere furrow turned with a plow around the land (*Sage v. Morosick*, 69 Minn. 167), or a line marked by cutting away the brush (*Worthley v. Burbanks*, 146 Ind. 534), or a fence opened so as to admit outside disturbers (*Sauers v. Giddings*, 90 Mich. 50),— may be sufficient under the circumstances to indicate, as a matter of fact, the boundaries of the adverse claim; and such boundaries may be evidenced satisfactorily to a jury by any means reasonably calculated to clearly suggest the same or suggest inquiry in regard thereto that would probably readily and clearly lead to a discovery of the truth. It is not necessary that such indications be sufficient to evidence constantly, by mere observation and without inquiry, the precise extent of an apparent hostile occupancy. If the claimant "raises his flag and keeps it up," so to speak, sufficiently to attract the attention of the true owner to the situation, in view of the circumstances of the invasion, as a hostile claim of title, knowledge of such owner may be presumed as a fact, on the general principle that what a person ought to know under the circumstances may be held to be within his knowledge regardless of the actual fact. Sedgwick & W.

Trial of Title to Land, § 735; *Lampman v. Van Alstyne*, 94 Wis. 417. In discussing this subject in *Cobb v. Davenport*, 32 N. J. Law, 369, it was in effect said that the title to premises may be obtained by continuous, exclusive, notorious, hostile appropriation thereof for the mere purpose of hunting, hawking, or fishing.

What has been said, either by direct reference or general treatment, answers the various reasons given by respondent's counsel why there should be a rehearing in this case. The difficulties with sustaining the conclusion reached by the trial court seem the same now as before. We think there was error in overlooking the fact that on the evidence defendants' right to recover did not rest wholly on the defense of adverse possession; that there was error in assuming that there was an entire absence of evidence tending to establish some of the necessary elements of adverse possession; that due consideration was not given to the character of the premises in determining whether such facts might reasonably be found by the jury to exist. Further, we think that it was overlooked that it was not essential to the defense of adverse possession to produce evidence tending to show that Muza was adversely possessed of the whole of Jones Island, or to show the exact boundaries of his adverse possession. It was sufficient to carry the case to the jury on the point under discussion, to produce evidence tending to show that he, for the requisite length of time, adversely appropriated territory, including the *locus in quo*, to a use to which it was adapted, under such circumstances that the owner, as a reasonably prudent person, ought to have been apprised of it. The question is, Can any sensible person reasonably say from the evidence that Muza's conduct was characterized by all the elements necessary to adverse possession of the premises in question? He testified, without objection, that he took possession of such premises in 1872 and retained such possession till he surrendered the same to *Bilot;* that

no one disturbed his right; that he *made no use of the land* because it was marsh. In saying he made no use of the land he evidently meant that he made no use thereof as dry land; for he said almost in the same connection that he used the premises in his business as a fisherman and trapper, as he did all the territory claimed by him. Further, he said he prohibited any person, other than those who lived on the island, from entering the territory, including *Bilot's* location. Once, in speaking of the use made of the premises he said "we" as if the use by him and the other settlers was in common. At another he used the pronoun "I" and indicated that he exercised authority, as an owner naturally would, to say who should and who should not enjoy the premises for fishing and trapping. Here, in the mind of the trial court, was the weakest point in the evidence. We can indorse that. It must be admitted that the truth of the matter would be very hard for any one to determine, but that does not justify the direction of the verdict. In view of the nature of the premises, the fact that they were in the immediate vicinity of a populous district where a hostile interference therewith would be quite likely to attract attention and become notorious, that there was some evidence that the premises were devoted to the very purpose for which they were best adapted, hunting and fishing — not occasionally, but as such business is ordinarily carried on,— some evidence that Muza assumed to have rightful dominion over the premises; that he resided thereon in the vicinity of the particular lot in question; that he enforced his claim of title as an actual owner would, by prohibiting any person from entering the territory to use the same for any purpose; that no other person pretended to exercise any such authority; that his claim of title was submitted to by everybody; that every person, from 1872 down till *Bilot* secured his location, who settled on the territory adversely claimed, did so by acknowledging Muza's title, by obtaining of him the

right to locate, and taking the particular parcel designated by him,— could a jury, under proper instructions, reasonably say that the elements of adverse possession were all established? Counsel for respondent have given us no reason which, when analyzed and tested by the principles we have discussed, seems to justify us in answering that question any differently than we did before.

By the Court.— The motion for a rehearing is denied.

ILLINOIS STEEL COMPANY, Respondent, vs. JEKA and wife, Appellants.

December 10, 1900 — March 19, 1901.

Illinois S. Co. v. Bilot, ante, p. 418, followed.

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action in ejectment. The issue in this case is the same, though different property is involved, as that in *Illinois S. Co. v. Bilot, ante,* p. 418. Plaintiff proved *prima facie* record title to territory including such property. The evidence on the part of defendants is to the effect that the territory of which the premises in dispute form a part is called "Jones Island;" that it was originally a sand flat, created by the movement of the waters of Lake Michigan, and was submerged by water from three to nine feet deep; that it was made feasible to construct buildings thereon by artificial filling.

The evidence was further to the following effect: In 1872 some nine families resided on the territory called "Jones Island." It was then all covered by water. One Truher owned one of the houses and claimed dominion over the entire territory. At the time stated Truher surrendered his

house and his claim of dominion over the entire territory to Jacob Muza, who immediately took possession of such house. Truher did not pretend to sell to Muza the houses occupied by the other persons located on the island, but pretended to surrender to him dominion over the entire island. There was some kind of a paper transfer by Truher to Muza of the house itself, but the paper has been lost. Whether such paper referred to any part of the territory aside from that occupied by the house, or anything but the house, does not clearly appear. From the time of the transaction related, between Muza and Truher, the former prohibited any person from exercising any act of ownership or from occupying any part of the territory except by his express permission. He exercised acts of ownership over the entire territory by preventing other persons from coming thereon as stated, and by building breakwaters to control the action of the water of Lake Michigan and prevent it from impairing the use of the premises for dwelling-house purposes, and by otherwise improving the territory for such purposes. From time to time he permitted persons to select portions of the submerged territory, to fill up the same, and locate houses thereon. There was no fence on any part of the territory when Muza located there, and no place to build a house except as made by artificial filling. About 1873 Muza pointed out to one John Zelin the territory in question as a place that he might fill up and occupy, receiving therefor a keg of beer. Zelin filled the territory allotted to him so as to make a foundation for his house above the level of the water, and constructed it thereon. He used the property continuously thereafter till about 1893. It was then, and had been for a long time prior thereto, inclosed by a fence, and in addition to the house originally built there were then a barn upon the property and some other improvements. In 1893, he sold the property to Joseph Konkel, who went into possession immediately upon Zelin vacating. Soon thereafter

Konkel sold the property to defendants, delivering possession thereof to them, and they thereafter occupied it continuously down to the time of the commencement of this action.

At the close of the evidence the court directed a verdict for plaintiff. Judgment was rendered upon such verdict, establishing title in fee to the property in plaintiff, and otherwise the judgment was rendered in accordance with the statute in such cases.

For the appellants there were briefs by *Fiebing & Killilea* and *M. C. Krause*, and oral argument by *O. J. Fiebing*.

For the respondent there was a brief by *Van Dyke & Van Dyke & Carter*, and oral argument by *W. E. Carter*.

The following opinion was filed January 8, 1901:

MARSHALL, J. The principles governing this case are identical with those which rule *Illinois S. Co. v. Bilot, ante*, p. 418. The same errors exist in this case which necessitate a reversal of the judgment in that case, and it is ruled accordingly.

By the Court.— The judgment of the superior court is reversed, and the cause remanded for a new trial.

BARDEEN, J., took no part.

A motion for a rehearing was denied March 19, 1901.

MARKS, Respondent, vs. SCHRAM, imp., Appellant.

December 11, 1900 — March 19, 1901.

Promissory notes: Indorsement: Delivery in blank to maker: Alteration: Forgery: Ratification: Notice to payee.

1. Where one person indorses his name upon the back of a blank promissory note and delivers it to another for the accommodation of the latter, to be used in a certain way, and the latter makes material alterations therein and uses it for a different purpose, the indorser will be liable thereon, if, knowing the facts as to the alteration and negotiation of the note, he acknowledges it and promises to pay it, even though such alterations constitute in law a forgery.

[2. Whether the payee of a note bearing the indorsement of a third person is put upon inquiry as to the maker's authority to use it, by obliteration of the words "after date" and "or order" from the printed form and the substitution of others in their place, doubted but not determined.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Affirmed.*

This is an action upon a nonnegotiable demand note for $11,000, payable to the plaintiff, dated August 20, 1894, signed by the defendant Richard Schram, and purporting to be indorsed by the defendant *J. B. Schram.* There was no answer by the defendant Richard Schram, but the defendant *Joseph B. Schram* answered, alleging that the note in question was an accommodation note; that when he indorsed his name upon it it was simply a blank form promissory note, and that in this condition he sent it to Richard Schram by mail, so that Richard might renew a previously executed accommodation note upon which the appellant was indorser; that Richard Schram thereafter made material and fraudulent alterations in the note, and did not use it for the purpose intended.

It appears by the evidence in the case that in August,

1894, and for a number of years prior thereto, the defendant Richard Schram was engaged in the woolen business in the city of New York; that the appellant, *Joseph B. Schram*, is the father of said Richard, and lives in the city of Chicago; that the appellant had at various times previous to 1894 made accommodation indorsements of his son's notes for the purpose of helping him in his business by discounting the same at banks in the city of New York; that in August, 1894, the appellant sent to Richard a note in the ordinary form, with the blanks unfilled, and his name indorsed upon the back; that when said paper was thus sent it read as follows:

"——. ——— ———.

"—— after date, I promise to pay to —— —— or order —— Dollars, value received, at ——.

"——— ———."

The appellant testifies that his son requested this note to use in reducing the amount of a note in a bank, and that it was sent with the understanding that it should be so used; but the son denies that any limitation on the use of the blank existed. It further appears that, after receiving this paper, Richard Schram filled up the blanks in the note, and drew a line through the words "after date" and "or order," so that the same read as follows:

"$11,000.00. New York, August 20th, 1894.

"On demand, I promise to pay to *Mr. E. N. Marks* Eleven Thousand Dollars, value received, at my office, 476 West 4th St. RICHARD SCHRAM."

The testimony of Richard Schram and *E. N. Marks* shows that some time previous to the 24th day of September, 1894, *Marks* had loaned to Richard Schram eleven $1,000 railroad bonds, and that Richard Schram had used these bonds as collateral in borrowing money at banks; that on the 24th of September, 1894, Richard Schram gave the note in question to the plaintiff, and that the plaintiff then gave Richard Schram a certified check for $11,000; that Richard Schram

used the check in taking up the said bank loans, which amounted to $10,500, returned the collateral bonds to *Marks*, and returned the remainder, $500.

The note was not paid at maturity, and was protested March 17, 1897. It further appears that some time in the fall of 1896 the defendant *Joseph B. Schram* went to New York City, and that a meeting was then held in New York, at which there were present the plaintiff, the defendant Richard Schram, and *Joseph B. Schram*, Louis Schram, a brother of Richard, and one Kuhn, who was the father of Richard's wife. The note in suit was produced at the meeting, and it is claimed on the part of the plaintiff that the appellant, *Joseph B. Schram*, after looking at the note, said that that was his note and his indorsement, and that he would take care of the note after Richard's other matters had been adjusted. The defendant *Joseph B. Schram* admits that the note was produced, and that he saw and read it; but claims that he denied liability thereon and refused to pay it.

At the close of the evidence both parties moved for the direction of the verdict, and both motions were denied. The court submitted to the jury a single question as a special verdict, to wit: "Did the defendant *Joseph B. Schram*, in the fall of 1896, agree to pay the plaintiff the note in suit?" The jury answered this question in the affirmative, and judgment was thereupon rendered for the plaintiff for the amount of the note in suit, and the defendant *Joseph B. Schram* appeals.

For the appellant there were briefs by *Winkler, Flanders, Smith, Bottum & Vilas*, and oral argument by *J. G. Flanders* and *Chas. F. Fawsett*. They contended, *inter alia*, that according to the weight of authority a forgery cannot be ratified by the party against whom the crime was committed so as to make him liable upon the forged instrument. *Henry Christian B. & L. Asso. v. Walton*, 181 Pa. St. 201;

Howard v. Turner, 155 Pa. St. 349; *Shisler v. Vandike*, 92 Pa. St. 44; *Brook v. Hook*, L. R. 6 Exch. 98; *Woodruff v. Munroe*, 33 Md. 158; *Workman v. Wright*, 33 Ohio St. 405; *Henry v. Heeb*, 114 Ind. 278; *Wilson v. Hayes*, 40 Minn. 531; *Owsley v. Philips*, 78 Ky. 517; *Warner v. Fant's Trustee*, 79 Ky. 1; *Ferry v. Taylor*, 33 Mo. 334; 2 Daniel, Neg. Inst. § 1352.

For the respondent there was a brief by *Miller, Noyes & Miller*, and oral argument by *Geo. H. Noyes*. To the point that a forgery may be ratified and that no new consideration is necessary, they cited *Greenfield Bank v. Crafts*, 4 Allen, 447; *Wellington v. Jackson*, 121 Mass. 157; *Bartlett v. Tucker*, 104 Mass. 336; *Dow's Ex'r v. Spenny's Ex'r*, 29 Mo. 386; *First Nat. Bank v. Gay*, 63 Mo. 40; *Cravens v. Gillilan*, 63 Mo. 28; *Casco Bank v. Keene*, 53 Me. 103; *Forsyth v. Day*, 46 Me. 176; *Commercial Bank v. Warren*, 15 N. Y. 577; *Howard v. Duncan*, 3 Lans. 174; *Hefner v. Vandolah*, 62 Ill. 483; *Gleason v. Henry*, 71 Ill. 109; *Paul v. Berry*, 78 Ill. 158; *Forsythe v. Bonta*, 5 Bush, 547; *Corser v. Paul*, 41 N. H. 24; *Union Bank v. Middlebrook*, 33 Conn. 95; *Crout v. DeWolf*, 1 R. I. 393; Mechem, Agency, § 116; *Pelton v. Prescott*, 13 Iowa, 567.

The following opinion was filed January 8, 1901:

WINSLOW, J. The trial court rightly held that if the appellant, knowing of the alterations in the note and the fact that it had been negotiated to *Marks*, acknowledged it and promised to pay it, this constituted ratification and rendered all other questions immaterial. The evidence showed that the plaintiff received the note without actual knowledge of any defect in its execution, and advanced to Richard Schram $11,000 on the strength of it. If it be conceded that *Marks* was put upon inquiry as to Richard's authority to so use the paper, by the obliteration of the words "after date" and "or order" upon the face of the note (a proposition ex-

tremely doubtful — *Maldaner v. Smith*, 102 Wis. 30), it was still perfectly competent for the father to ratify the unauthorized act, and such ratification would be equivalent to original authority, even if such alterations constitute in law a forgery. Mechem, Agency, §§ 112–116; *Wellington v. Jackson*, 121 Mass. 157; *Commercial Bank v. Warren*, 15 N. Y. 577; *Forsyth v. Day*, 46 Me. 176; *First Nat. Bank v. Gay*, 63 Mo. 33; *Goodspeed v. Cutler*, 75 Ill. 534.

The jury have found that he ratified the act after full knowledge of the alterations and of the fact that it was held by *Marks*. This finding is based upon sufficient evidence, and was reached without material error; hence the judgment was right.

By the Court.— Judgment affirmed.

BARDEEN, J., took no part.

A motion for a rehearing was denied March 19, 1901.

BEYERSDORF, by guardian *ad litem*, Respondent, vs. CREAM CITY SASH & DOOR COMPANY, Appellant.

December 12, 1900 — March 19, 1901.

Master and servant: Negligence: Personal injury: Special verdict: Finding opposed to possibility: Sufficiency: Presumptions.

1. In an action against his employer to recover for injuries caused by plaintiff's hand coming in contact with a "slat saw," it is *held* impossible, in the light of undisputed physical facts, that the injury could have been caused, as found in the special verdict, by the portion of the saws above the feed table.
2. The finding as to the particular peril from which the injury resulted being thus conclusively wrong, other findings of the special verdict as to defendant's negligence proximately causing the injury, plaintiff's knowledge of perils, instruction as to same, and exercise of

care to avoid them, are vitiated, because they refer to the particular peril mentioned; and the whole verdict is rendered inconclusive and insufficient to support any judgment.

3. Where in such a case there is a reasonably possible theory of the injury consistent with the employer's due care in the equipment and operation of the machine, the mere happening of the accident does not suffice to establish his negligence and liability.

APPEAL from a judgment of the superior court of Milwaukee county: ORREN T. WILLIAMS, Judge. *Reversed.*

Action by plaintiff, who, on March 10, 1898, when fourteen years and eight months of age, suffered loss of a hand as an employee of defendant in its factory at Milwaukee, while working at a device called a "slat saw," which, so far as possible in words, may be described as follows:

The east or operating part consisted of a flat plane or feed table, twenty-eight inches long north and south, and four inches wide, bounded on the west by a rigid vertical side two inches high and open towards the east. The feeder stood at the north end of this feed table. About nineteen inches from the north end there were hung on a shaft below this table two rigid circular saws about nine inches in diameter and extending above the said feed plate or table about two and one-eighth inches. These saws revolved towards the feeder at the north. About four inches north of the north edge of these saws was a toothed wheel which, revolving, engaged any piece of wood pushed up to it by the feeder and pushed it end first against the saws. Above the saws was a curved, nearly semicircular, rigid plate or guard of steel of about two inches greater radius than the saws, the ends of which, respectively, in front and back of the saws, extended downward to within one and three-quarters inches above the feed table, the purpose of which was to hold down any piece of wood while passing through the saws, which, but for such guard, would be thrown violently upward and northward as soon as it had passed from under

the toothed feed wheel above mentioned. The two saws were about one half or nine sixteenths of an inch apart, and the inner or westerly one about the same distance from the vertical west side of the feed table, so that as strips of wood were passed through they were sawed into two slats about one half inch thick, any excess of the strip outside of the east saw going to waste. These strips were previously prepared so as to be approximately one and three-quarters to two inches thick vertically, and one and three-eighths to one and a half inches wide, and of lengths from eight inches to two feet. It was the duty of the feeder standing at the north to slide these strips onto and along the feed table until the toothed wheel engaged them and fed them against the saws, each strip serving to push its predecessor through the saws under the overhanging steel guard, and on southward till they reached the south end of the feed table, about six or seven inches beyond the saws, and about four and one-fourth inches beyond the south end of the overhanging guard.

South or southeast of the machine was stationed a boy whose duty it was to receive the slats into which the strips had thus been sawed, and to put them in a pile to be carried to other machines, and to put the waste strip cut off by the easternmost saw into a pile for kindling wood. At this latter work plaintiff was engaged on March 10, 1898. He had been at work for defendant a little less than a month; had first worked at the slat saw something more than two weeks before; had worked at it in all on five or six different days,—the whole time aggregating about one day. He had at first been shown his duty to take away the slats after they had passed through the saw, such instruction not indicating a necessity of reaching nearer the saws than the south end of the feeding table. The testimony is conflicting as to whether he had been warned of the peril of injury from getting his hands in contact with the saws. While

so engaged the feeder, Schultz, having fed through all of the strips which he had and pushed the last one of the bundle into the saws, had turned away to get more strips. Plaintiff testifies that he took hold of the slats of this last piece, and as he took hold of them felt the stick jerk backward, and when he looked the stick was gone and his hand was gone; that he took hold of the slats for the purpose of taking them away. Further than this he knows nothing of how the accident occurred. His right hand was cut completely off, except the thumb, which was sawed through except the flesh on the side away from the hand. The hand was cut off at a point from an inch to an inch and a half towards the wrist from the knuckles. The fingers were found scattered in various directions north and south of the machine, underneath the feed table amongst the sawdust, and on top of the feed table. A considerable quantity of blood was observed at various points of the machine beneath the feed table, and a few spots above it and upon the teeth of the saws.

The defect alleged was the absence of boxing around the upper part of the machine on top of the feed table, the plaintiff testifying that when he first worked on the machine there had been a wooden box which covered the whole device, having sides both east and west of the saws, while at the time of the injury the box in use had merely a top and the west side to it, so that it was open on the east side. This box was placed over the saws by the feeder to prevent sawdust, etc., flying back in his eyes.

The jury found in favor of plaintiff in answer to a series of seventeen questions, and among others, in answer to question 8, that the plaintiff's hand was cut by that portion of the saws which projected above the saw table (feed table); and, in answer to question 9, that the last stick fed to the saws by Schultz, when grasped by plaintiff to be removed, jerked back, and pulled plaintiff's hand against the saws,

causing the the injury. From judgment in favor of plaintiff defendant appeals.

Joseph B. Doe, for the appellant.

For the respondent there was a brief by *Whitman & Ryan* and *Tarrant, Kronshage, McGovern & Dielmann*, and oral argument by *W. D. Tarrant* and *A. B. Whitman*.

The following opinion was filed January 8, 1901:

DODGE, J. The situation disclosed by the evidence presented several methods by which plaintiff's hand might have come in contact with the saws, including at least the possibility of a wholly needless placing of his hand in contact with the saws, within a peril which could not but be obvious to any one who had ever seen a circular saw cut wood. Whether or not the evidence of the situation supplied foundation for anything but a guess or conjecture as to how the injury in fact occurred may perhaps be doubtful, but upon the verdict before us it becomes unnecessary to consider or discuss any theory other than that which has specifically been adopted by the jury. If that theory be not the correct one, then it cannot be said that the verdict has negatived a different theory which might involve contributory negligence or might be so beyond the range of reasonable expectation that the condition of the machine could not be deemed proximate cause. We had in this case the somewhat unusual advantage of having presented before us on the argument the machine itself, and of opportunity to test the suggestions and theories of counsel thereby. It is quite impossible to express in words at all clearly the result of such observation. Certain physical facts were thereby made obvious, such, for example, as that the space below the south end of the overhanging steel guard — under which, on the theory of plaintiff's counsel, his hand, in contact with the strip of wood, must have passed in order to reach the saw — was not sufficient to allow plaintiff's hand to pass under it

towards the saws if that hand was on top of the strip of wood; for the end of the guard was only, at most, a quarter of an inch higher than the strip itself. That plaintiff's hand must have been placed on top of the stick if he had hold of it at all results conclusively from the wound, which is squarely across the hand from little-finger side to thumb side, so that the hand must have been at right angles to the plane of the saws and to the stick passing through them. If the stick were grasped in any other manner, as by seizing the south end of it, the ends of the fingers would have been towards the saws, and the course of any cuts must have been longitudinal, from the ends of the fingers towards the wrist. Again, the infliction of this wound at a place in the hand nearly four inches from the ends of the fingers is rendered impossible at any place above the feed table, even if it could have got within the overhanging guard; for the upright or west side of the feed table was only one and one-half inches west of the easternmost saw, and other complete obstacles to intrusion of the hand above the saws were only one half or three quarters of an inch further west. Besides these facts, it is established, without controversy, that all the portion of the saws above the feed table, except, perhaps, the tips of the teeth at the top of the saws, was occupied by the stick passing through them, so as to render impossible the cutting through of plaintiff's hand. There could, at most, have occurred only comparatively shallow lacerations from the upper part of the saw, under the conditions which existed.

From the foregoing circumstances, and others almost impossible of intelligible description without the machine before the eye, we are forced to the conclusion that the injury to plaintiff's hand could not have been caused by the portion of the saws above the feed table in the manner described by the ninth question and answer of the special verdict; that such manner of injury was an impossibility, in the light

of the physical facts appearing without dispute. Being so opposed to possibility, the verdict on that subject cannot stand. It is not supported by any credible evidence. *Badger v. Janesville C. Mills*, 95 Wis. 599, 603; *Vorbrich v. Geuder & P. Mfg. Co.* 96 Wis. 277; *Cawley v. La Crosse City R. Co.* 101 Wis. 145, 149; *O'Brien v. C., St. P., M. & O. R. Co.* 102 Wis. 628, 632.

Since the jury are thus conclusively wrong as to the particular peril from which the injury resulted, their other findings upon which the judgment rests are vitiated. Their answers to the eighth and ninth questions establish what exposure they had in mind as causing the injury, and exclude the supposition that they had any other. Their finding that defendant was guilty of negligence which was the proximate, natural, and probable cause of the injury must at once be referred to their previous answers, and constitutes only a finding that defendant was negligent in not guarding against the peril of a backward jerk of the strip of wood, bringing plaintiff's hand in contact with that portion of the saws above the feed table. If there were other perils, as of course there were, and, equally of course, some of such other perils caused the injury, the jury has not found that defendant was negligent as to such other perils, nor that its negligence was the proximate cause of the injury. So, also, with reference to plaintiff's knowledge of perils, instruction as to same, and exercise of care to avoid them, the findings are rendered immaterial. The jury have found he was ignorant, uninstructed, and careful as to a peril which did not cause his injury, but have made no findings on those subjects as to the peril from which he in fact suffered. So that the verdict fails to establish that defendant was guilty of negligence which injured plaintiff, proximately or at all, or that plaintiff is free from contributory negligence, or that the injury was not the result of mere accident. Without verdict upon some or all of those issues, judgment for plaintiff cannot stand.

Respondent invokes the rule of *Cummings v. Nat. F. Co.* 60 Wis. 603, 612; *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225, 236; and *Carroll v. C., B. & N. R. Co.* 99 Wis. 399, that the happening of the accident alone suffices to establish defendant's negligence and liability. In *Musbach v. Wis. C. Co.* 108 Wis. 57, we pointed out the inapplicability of that rule in the presence of even a reasonable possibility that some other cause than defect in the machine might have caused the injury. Here, as in the *Musbach Case*, the physical facts and circumstances show the possibility, at least, that plaintiff's injury came from the lower part of the saws, below the feed table. Indeed, some of those circumstances seem hardly consistent with any other theory. The place and direction of the cut across his hand, the volume of blood found below the feed table, while only scattering spots are found above, and some other circumstances, are difficult to account for otherwise. However the weight of probability may be, only reasonable possibility is necessary to demand consideration of the theory of an injury below the feed table. Whether an injury at that place could occur without negligence on plaintiff's part, or could have reasonably been expected by defendant to happen in the ordinary performance of plaintiff's duties, we need not now decide. It is sufficient to say that neither fact appears so clearly as to be matter of law. There is therefore a reasonably possible theory for the injury not necessarily inconsistent with defendant's due care in equipment and operation of the machine, which fact excludes this case from the rule of the authorities above mentioned.

From what we have said, it is obvious that by the answers to the eighth and ninth questions the entire verdict is rendered inconclusive, and insufficient to support any judgment, and should, upon appellant's motion, have been set aside. Refusal of that motion was error, for which the judgment must be reversed and a new trial ordered. We deem un-

necessary discussion of the assignments of detail errors in the course of the trial, as they are of a character very likely to have no relevancy to further proceedings in the cause.

By the Court.—Judgment reversed, and cause remanded for a new trial.

BARDEEN, J., took no part.

A motion for a rehearing was denied March 19, 1901.

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109 464 MARTENS and others, Appellants, vs. REILLY and others,
110 *255 imp., Respondents.

December 14, 1900 — March 19, 1901.

Conspiracy: Civil action: Damages: Violation of contract: "Unlawful act."

1. In a civil action for damages instituted against members of a conspiracy, the gist of the action is the damage; while in a criminal prosecution for the offense of conspiring, the gist of the action is the conspiracy.
2. A conspiracy is defined to be a combination of two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means.
3. If the object to be attained by a conspiracy be criminal or unlawful, the combination offends against the criminal law by common-law rules without any overt act, and by statute when there is such overt act. (Stats. 1898, sec. 4568. But see secs. 4466*a* and 4466*b*, pertaining to the statutory conspiracies.) And if the means to be used are criminal or unlawful, the ultimate end to be attained need not be essentially wrong. In either case if damage is produced to the person against whom the conspiracy is directed, an action to recover the same will accrue to him against all the guilty parties.
4. The gist of the civil action against conspirators being the damage, the general rule is that it will not lie against many acting in concert if it will not lie against one of them for the same act. Such rule does not apply to criminal actions.

5. The violation of a contract is an unlawful act. Therefore, if one or more persons conspire with another to commit, or two or more persons combine together to effect, such violation, and the object of the combination be consummated to the damage of a third person, such third person has his action to recover the damages against him who breached the contract and every person who, by reason of the combination, is connected with the wrong.

[Syllabus by MARSHALL, J.]

APPEAL from a judgment of the superior court of Milwaukee county: J. C. LUDWIG, Judge. *Reversed.*

Action for damages. The facts stated in the complaint are substantially as follows: *John A. Martens* and *William Bechstein*, in the fall of 1896, relying on representations made by defendant Mary J. O'Connor and corroborated by her attorney, as to her legal rights, leased of her certain lands in the city of Milwaukee, describing the same, for the term of five years at the yearly rental of $200 and the taxes, paying $100 down upon the lease. The lease was made in writing, and in addition to the essential stipulations it contained the following provisions:

(1) The lessee shall have the first privilege to purchase the premises during the term of the lease, for such price and on such terms as the parties to the lease shall mutually agree to.

(2) In case of a sale of the premises by the lessor she shall have the privilege of canceling the lease on giving written notice of such sale and cancellation, and thereupon the term of the lease shall terminate at the close of the second summer season from the date of such notice, no rent, however, to be paid for the last six months.

(3) The lease shall not be assigned, nor the premises underleased, without written consent of the lessor first obtained.

(4) The leased premises shall be used for the maintenance of a first-class swimming and bathing institution, with the right of furnishing refreshments to its patrons.

(5) The lessees may grade the river bank in preparing the premises for the bathing houses and buildings, but at the end

of the term they shall restore the premises to the condition existing at the time of making the lease.

Soon after the lease was made, the lessees caused the plaintiff *Bechstein-Martens Company* to be incorporated, and then assigned the lease to such company. Consent to the assignment was not obtained of the lessor before making it, but she knew of the contemplated assignment and verbally consented to the same. Prior to February 26, 1897, the leased property was taken possession of by the lessees and improvements were commenced thereon which were under way on that date. Prior to that day, and with knowledge of all the conditions of the lease, one *Bernard O. Reilly*, at the instigation of defendants *Ernst A. Conrad* and *Edward A. Benson*, prevailed upon the lessor and her children to ignore the provisions of the lease giving to the lessees the first chance to purchase the premises, and to give to said *Reilly* or his assigns an option to purchase the same for $8,000. Such option was obtained for the purpose of preventing the establishment of the swimming school, or ending the maintenance of it on the premises as soon as practicable. All of the O'Connors, *Reilly*, and *Benson* co-operated in that scheme. The option, as soon as obtained, and as was previously contemplated by *Reilly*, was assigned to *Conrad* and *Benson*.

About the time the option to purchase was made, plaintiffs *Martens* and *Bechstein* discovered that Mrs. O'Connor had only a dower interest in the property, and that the legal title was in her six children as heirs of her deceased husband, and thereupon they applied to her and her children to obtain a ratification of the lease, and for a written consent to the assignment. By reason of the interference of *Reilly* and his efforts and those of *Benson* and *Conrad* to prevent the use of the property for a swimming school, plaintiffs *Martens* and *Bechstein* experienced considerable difficulty in obtaining a ratification of the lease and a written consent

to its assignment, but such ratification and consent were finally obtained.

In furtherance of the conspiracy to prevent the establishment and maintenance of the swimming school, after the option to purchase was obtained, the holders of such option caused the O'Connors to sign a written cancellation of the lease, which was served upon the plaintiffs, and they were also notified to desist from further improving the property. Their contractors were also notified by the conspirators to stop working upon the property, and to influence them to do so they were told that plaintiffs would not be ready to pay them. When the option to purchase was obtained, *Conrad* and *Benson* did not intend to purchase the property but intended to use the option to deter plaintiffs from establishing the swimming school. The O'Connors were induced by them to violate the terms of the lease and to refuse to protect the lessees in the enjoyment of the benefit of the privilege secured to them by such terms. The result of the conduct of the conspirators was that plaintiffs were obliged to abandon their purpose of constructing and maintaining a swimming school on the leased premises, suffering great loss in doing so.

Defendant Lawrence O'Connor answered separately and apart from the other defendants. Defendants *Patrick F.* and *Phillip O'Connor* joined in an answer, as likewise did *Ernst A. Conrad* and *Edward A. Benson.* The answers were to the effect that the option to purchase was obtained in good faith and not with any intent to injure plaintiffs or either of them; that no conspiracy was entered into or carried out to commit such injury; and that the property was purchased of the O'Connors subject to the lease.

The evidence produced upon the trial proved or tended to prove the following facts: The lease was obtained originally of Mrs. O'Connor, was thereafter ratified by the holders of one half the legal title, was assigned to the plaintiff corpo-

ration, and permission to make such assignment was given in writing as alleged. The assignment was made and the ratification as well, before consent was obtained in writing for the making of the assignment, but Mrs. O'Connor knew of the purpose to make the assignment and verbally consented thereto. The original lessees learned of the state of the title about the time notice to quit was served upon them, and they thereafter obtained the ratification of the lease of the O'Connor heirs and their consent to the assignment. The option was obtained by *Reilly* for *Conrad* and *Benson* with full knowledge of the terms and conditions of the lease. *Reilly* worked upon the sympathy of Mrs. O'Connor, bringing to her attention the objections of himself and others to the use of the property for a swimming school, and his friendship for her deceased husband. In that way and others calculated to stimulate the sympathy of Mrs. O'Connor, he prevailed upon her to give him an option to purchase the property and break her agreement with *Martens* and *Bechstein* and their assignee, the *Bechstein-Martens Company*, to give to the holders of the lease the first right to purchase the property. *Conrad* and *Benson* desired to become the owners of the property for the sole purpose of destroying the swimming-school enterprise as soon as possible.

After plaintiffs knew of the option to purchase, they offered to take the property of the O'Connors on the same terms given to *Reilly*, but the O'Connors were made to believe, by the holders of the option to purchase, that it prevented them from recognizing the rights of the lessees to take the property by purchase, and were induced to co-operate with the efforts to exclude plaintiffs from any interest in the property. The lessees tendered the sum of $400 to the O'Connors and to the holders of the option, which sum was the down payment made by the holders thereof, and demanded the benefit secured to them by their lease as regards the purchase of the property; but the demand was

refused. The holders of the option caused a notice to be made and served terminating the lease, and after they became part owners of the property — which they did by a deed to Nunnemacher, who took the title direct from the O'Connors by the direction of *Conrad* and *Benson*, and a deed of Nunnemacher to *Conrad* and *Benson* and one Wild whom they associated with them — they notified plaintiffs in writing of the state of the title. Plaintiffs' contractors, who were making the improvements upon the property, after the option was obtained, were made to believe by *Conrad* and *Benson* that there was danger of their not getting their pay and that they had no right to place improvements upon the property. They thereupon stopped work, but afterwards commenced again.

Upon plaintiffs' finding that they would be obliged to resort to litigation to establish their rights under the lease, and upon their being unable to obtain any assurance from the holders of the title that they would be allowed to peaceably occupy the property for any considerable length of time, or for any time beyond that allowed to them after the cancellation of the lease, they abandoned the property and leased other lands for the establishment of their swimming school, paying as additional rent $327 per year, and removing their improvements to the new premises so far as such improvements were capable of being removed. They suffered a loss by reason of the facts, in addition to the increased rent, of some over $700. The privilege secured to the lessees in the lease, to take the property by purchase, was a very valuable feature thereof. The improvements on the property, necessary to the establishment of the swimming-school enterprise, were costly, and could not be removed except in part. By reason thereof a long-term lease was necessary in order to enable the lessees to have the use of such improvements for such length of time as to account for their diminution in value to the lessees at the end of the

term. It was also necessary to protect the leasehold estate against disturbance, in the event of the lessor wanting to sell the property and cancel the lease under the right reserved for that purpose, by the preference secured to the lessees to become the purchasers. Without the long term, coupled with the privilege to purchase the leased premises, the prospects of the enterprise were not sufficient to warrant the expenditure of money contemplated by the lease.

At the close of the evidence defendants moved the court for a nonsuit, which motion was granted, and judgment was entered against plaintiffs for costs.

For the appellants there was a brief by *McElroy & Eschweiler*, and oral argument by *F. C. Eschweiler*.

For the respondents *Conrad*, *Benson*, and *Reilly* there was a brief by *Winkler*, *Flanders*, *Smith*, *Bottum & Vilas*, and oral argument by *C. E. Wilde*.

The following opinion was filed January 8, 1901:

MARSHALL, J. It will be seen by the foregoing that the facts upon which this case turned were established without reasonable controversy. If the law applicable thereto is in plaintiffs' favor, clearly, under proper instructions for the guidance of the jury, the case should have been submitted to them to determine how much the defendants ought to pay as compensation for the wrong done. It seems that proper attention was not paid by the learned trial court to the law of the case as laid down by this court on the former appeal. [*Martens v. O'Connor*, 101 Wis. 18.] The opinion seems to say plainly that on the facts alleged appellants had at least some contract rights against at least some of the O'Connors, and were lawfully in possession of the leased premises; that a violation of those rights was actionable, and that a combination to wilfully effect such violation rendered all the persons liable for the resulting legal damages who were participants in such combination.

True, the law was not stated in just that way, but it is considered that the trained legal mind ought reasonably to have so read it. Legal opinions are written in contemplation of their being read and applied by persons learned in the law. It may be that too little attention is paid to the probability of a partisan reading thereof by practitioners, and the effect of such reading upon a trial judge, who is liable, in the press of business under which such judges often labor, to depend to some degree at least upon the ideas of attorneys as to the scope of a decision. The ideal of judicial perfection in stating a legal proposition will have been reached when one can put ideas into language so plain that no person of common sense, whether he be a layman or a specialist, can fail in reason to understand it. Probably no one here has the egotism to hope to reach that ideal; yet, expressing my personal view in passing, it is believed that the former statement of the law in this case came reasonably close to it. True, some mention was made of the fact alleged in the complaint that the option to purchase was fictitious; but it seems that no room was thereby created for believing that such fact was considered of any significance other than as a matter of aggravation of the injury, in that it indicated a specific intent to accomplish the wrong. True, it was also said, that the cause of action, in the main, "is based upon the claim that defendants conspired to plaintiffs' injury." That is plainly pregnant with the idea that the gist of the wrong complained of is not the conspiracy, but the damages suffered, and that the conspiracy is important only in that it connects persons with the infliction of such damages so as to render them legally liable therefor, though they may not personally have committed any of the overt acts. It was distinctly said that the lessees had some rights, and that a combination to wilfully violate those rights rendered all persons connected therewith liable for the injury to the plaintiffs.

We might rest this case upon what has been said. It clearly indicates that the plaintiffs' right to recover was established, that the amount of the recovery was the one question left to be determined, and that such question, under proper instructions, should have been submitted to the jury. However, a brief statement of principles may be of some use in the further proceedings to be had and as a precedent for reference in other litigation.

In a civil action against members of a conspiracy for the recovery of damages, unlike a criminal action, the gist thereof is the damage, not the conspiracy. *Smith v. Nippert*, 76 Wis. 86; *Hutchins v. Hutchins*, 7 Hill, 104; *Bush v. Sprague*, 51 Mich. 41; *Garing v. Fraser*, 76 Me. 37; *East Missouri v. Horseman*, 16 U. C. Q. B. 556; *Kimball v. Harman*, 34 Md. 407; *Leverty v. Vanarsdale*, 65 Pa. St. 507; *McHenry v. Sneer*, 56 Iowa, 649; *Adler v. Fenton*, 24 How. 407; Cooley, Torts (2d ed.), *125. An act legal in itself, in that it does not offend against the criminal law and the injuries are *damnum absque injuria*, regardless of its violation of moral standards, whether such act be the one perpetrated or the means used to that end, generally, if not the subject of a civil action for damages when done by one person, is not if done by many acting in concert. It should be noted that this principle is confined to civil actions, for the very reason that legal damages are essential thereto, while it is otherwise in a criminal prosecution where the gist of the offense is the conspiracy. True, there are cases where it is held that the object of the conspiracy must be actionable in a criminal as well as in a civil case; but the great weight of authority in this country and in England as well is the other way. It is not necessary to discuss here the reason for the distinction. The following are but a few of the many cases that might be cited to support it. *Rex v. Journeymen Taylors*, 8 Mod. 11; *State v. Rowley*, 12 Conn. 101; *State v. Donaldson*, 32 N. J. Law, 151; *Comm. v. Waterman*, 122 Mass. 43; *Morris Run*

C. Co. v. Barclay C. Co. 68 Pa. St. 187; *State v. Buchanan*, 5 Har. & J. 317; *State v. Younger*, 1 Dev. Law, 357; *Savile v. Roberts*, 1 Ld. Raym. 374; *Adler v. Fenton*, 24 How. 407; Lord BOWEN in *Mogul S. S. Co. v. McGregor*, 23 Q. B. Div. 616; *Huttley v. Simmons*, [1898] 1 Q. B. Div. 181; 3 Chitty, Cr. Law, 1139. It may be observed in passing that failure to note the distinction indicated, between the facts calling for a civil and those for a criminal remedy, often leads to a confusion of ideas as regards when an action for damages against several wrongfully acting in concert will and when it will not lie, and that there are indications in the books that such confusion has influenced the decisions of courts in some instances to the extent of producing erroneous declarations of law and denials of justice.

The essentials of a conspiracy, whether viewed with regard to its importance in a criminal prosecution or its significance in a civil action for damages, are commonly described in this general language: It is a combination between two or more persons to do a criminal or an unlawful act or a lawful act by criminal or unlawful means. The word "unlawful" is not confined to criminal acts. It includes all wilful, actionable violations of civil rights. In any case the object of the combination is what gives it legal significance. If that object be to do an unlawful act in the sense of committing an actionable wrong, the means contemplated by the combination to effect such object are not material to the cause of action, whether such action be to punish the perpetrators for entering into such a combination or to recover of them the damages inflicted by carrying out its object. If the object of the conspiracy be the use of unlawful means, whether such means be the violation of the civil or criminal law, the unlawfulness of the end sought to be attained is not controlling either in a prosecution for the offense of so conspiring or an action to recover the damages suffered by

the consummation of the wrongful purpose. 6 Am. & Eng. Ency. of Law (2d ed.), 841. So the rule of common law is, as regards indictments for criminal conspiracies, that where the crime depends on the object of the conspiracy, that object must be set forth, but the means need not be; but where the crime depends upon the character of the means to be employed, they are material and must be alleged. *Reg. v. King*, 7 Q. B. 782; *Sydserff v. Reg.* 11 Q. B. 245; *Rex v. Gill*, 2 Barn. & Ald. 204; *People v. Richards*, 1 Mich. 216. And the same is true under the new procedure. *State v. Crowley*, 41 Wis. 271.

In the light of the foregoing elementary principles, the right of plaintiffs to recover, on the facts established by the evidence, is too clear for reasonable controversy. Plaintiffs had a lease binding from the first on Mrs. O'Connor at least, and subsequently on three of her children. It was immaterial whether she really had any interest in the property which she could lease. So long as she assumed the right to lease the property she was legally bound to make her agreement good. As against her and the three children, at least, plaintiffs were entitled to the full benefit of every promise contained in the lease, including the one giving them the first privilege to purchase the property, which privilege, as it seems from the evidence, was valuable to them to protect their possession for a sufficient length of time to render it reasonably safe to make the large expenditure contemplated by the business which they were about to enter upon. If the lessors bound themselves by the lease beyond their rights in the property, that did not militate against the right of plaintiffs to hold them liable to carry it out so far as they could, and for damages for breach of so much thereof as they could not perform. The violation of the contract was an unlawful act rendering them liable to civil remedies for damages. They wilfully committed such

violation. They refused to give the lessees the privilege of protecting their possession of the premises by the purchase thereof when the conclusion to sell was reached, and that seriously damaged them. There we have the unlawful act requisite to hold parties, in combination to perpetrate it, liable for resulting damages. Defendants *Conrad* and *Benson* combined with the O'Connors to accomplish that wrong. They were really the moving parties in the whole matter. But for their wilful intermeddling in the affair between the O'Connors and plaintiffs it is not probable that the contract would have been violated. The unlawful act would have been actionable if no one had been concerned in it but Mrs. O'Connor. The others combined with her to do such unlawful act. The object of the combination was accomplished and there was resulting damage to plaintiffs. So the case fits the legal test at every point. The damage stands out significant, independent of the combination. The combination connects all parties with the damage that were guilty participants in the wrong.

It is possible that it may have been the view of the learned trial court that the mere wilful breaching of a contract is not an unlawful act within the meaning of the law of conspiracy. The law on that question is well settled. In a very recent and somewhat famous case in the United States supreme court the breaking of a contract was the object of the combination, and it was held an unlawful act and sufficient to render all the participants therein liable. *Angle v. C., St. P., M. & O. R. Co.* 151 U. S. 1. This emphatic language was there used by Mr. Justice BREWER:

"It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer."

Many leading cases on this branch of the law of conspiracy were cited by Mr. Justice BREWER, with quotations from

opinions in such cases. The following of such quotations are significant:

"Wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural and probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie. . . . If these conditions are satisfied, the action does not the less lie because the natural and probable consequence of the act complained of is an act done by a third person; or because such act so done by the third person is a breach of duty or contract by him, or an act illegal on his part, or an act otherwise imposing an actionable liability on him." BRETT, L. J., in *Bowen v. Hall*, 6 Q. B. Div. 333, 337.

"If a person maliciously entices laborers or croppers to break their contracts with their employer and desert his service, the employer may recover damages against such person. The same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts for service." RODMAN, J., in *Jones v. Stanly*, 76 N. C. 355, 356, affirming *Haskins v. Royster*, 70 N. C. 601.

See, also, Cooley, Torts (2d ed.), 330; *Lumley v. Gye*, 2 El. & Bl. 216; *Walker v. Cronin*, 107 Mass. 555.

Enough has been said to enable the trial court to properly end this litigation without its coming here again. If the case shall be, upon a new trial, presented the same as before, it will be the duty of the trial court to submit to the jury, under proper instructions, the question of damages. We shall not anticipate that there will be any mistake in that regard by marking out in advance any guiding line. The principles governing the subject are not of serious difficulty either to state or comprehend. The trial court will doubtless direct the jury properly in regard to the law to be applied in determining the recoverable damages, without any suggestion from here.

By the Court.—The judgment of the superior court is reversed, and the cause remanded for a new trial.

BARDEEN, J., took no part.

The respondents moved for a rehearing.

In support of the motion counsel contended that the decision is grounded on the proposition that the agreement in the lease to give the lessees the first right to purchase was a binding agreement, the violation of which was an unlawful act — a question not decided or considered on the former appeal. That agreement was absolutely nugatory and gave rise to no legal obligation. It was indefinite and incomplete; the minds of the parties never met. *Gill Mfg. Co. v. Hurd*, 18 Fed. Rep. 673; *Wardell v. Williams*, 62 Mich. 50; *Mayer v. McCreery*, 9 N. Y. St. Rep. 114; *Fogg v. Price*, 145 Mass. 513; *Hayes v. O'Brien*, 23 L. R. A. 555. It was void under the statute of frauds. *Harney v. Burhans*, 91 Wis. 351; *Brandeis v. Neustadtl*, 13 Wis. 142, 149; *Seymour v. Cushway*, 100 Wis. 580.

The motion was denied March 19, 1901.

BARTLETT and another, Respondents, vs. COLLINS, Appellant.

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110 *122

109 477
114 * 37

February 2 — March 19, 1901.

Contracts: Conflict of laws: Public policy: Gambling: Sale of grain on board of trade: Rules of board: Special verdict: Instructions to jury: Burden of proof.

1. If a personal contract is to be performed partly where made and partly in other countries or states, the law of the place where it is made will govern, unless a clear mutual intention is manifested that it shall be governed by the law of some other country.
2. A contract, made in this state between residents thereof, by which one employed the other, a broker, to sell wheat for him in Chicago and agreed to pay a commission for such service and to indemnify the broker against loss, is governed by the law of this state.
3. The courts of this state will not hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates public law.

4. One who employs a broker to make a sale for him on a board of trade impliedly submits himself to the lawful rules of such board.
5. Where a case is submitted to the jury for a special verdict, it is error to give instructions applicable only to a general verdict.
6. To uphold a time contract for the sale and delivery of grain upon a board of trade, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. *Barnard v. Backhaus*, 52 Wis. 593, followed. CASSODAY, C. J., and DODGE, J., dissent.
7. The rule as to burden of proof, laid down in *Barnard v. Backhaus*, 52 Wis. 593, was not changed by the subsequent enactment of sec. 2319*a*, Stats. 1898.

APPEAL from a judgment of the circuit court for Sheboygan county: MICHAEL KIRWAN, Circuit Judge. *Reversed.*

The plaintiffs, who are grain commission merchants in the city of Milwaukee, brought this action against the defendant to recover upon open account for moneys advanced and services performed for the defendant in July and August, 1897. The account is set forth in the complaint as follows:

E. C. Collins, in account with Leman Bartlett & Son,

Dr.

August 19th, 1897.	To 2,000 bu. wheat at $.89⅛		$1,782 50
"	To commission		2 50
Total			$1,785 00

Credit.

July 30th, 1897.	By 1,000 bu. wheat sold at $.75¼	$755 00	
Aug. 3rd, 1897.	By cash received	30 00	
Aug. 6th, 1897.	" " "	50 00	
Aug. 6th, 1897.	By 1,000 bu. wheat sold at $.78¼	782 50	
Total			$1,617 50
Balance due			$167 50

The answer, after setting forth a general denial of the complaint, alleges that the transactions between the parties were gambling transactions, and void under the statutes; that all of the contracts made by the plaintiffs with the defendant by which the plaintiffs undertook to buy and sell

wheat for the defendant were made without intending either to receive or deliver grain, but wholly to wager in the market price of wheat at the Chamber of Commerce in the city of Chicago, intending only to pay or receive the difference between the price and the market rate, whatever the same should be. It appeared in the evidence that the defendant, *Collins*, resided at Plymouth, Wisconsin, and that his business was farming and buying grain; that on the 30th of July, 1897, he telephoned to the plaintiffs and told them to sell for him 1,000 bushels of December wheat, Chicago delivery; that on August 6th the defendant directed the plaintiffs to sell another 1,000 bushels of December wheat, Chicago delivery; that the plaintiffs made both sales upon the Chicago Board of Trade through their Chicago agents, the first being made at $.75½, and the second at $.78¼. No wheat was actually delivered on either of these sales. The price of wheat advancing, the plaintiffs immediately began to require the deposit of margins by *Mr. Collins*, and on August 3d the defendant sent $30, and on August 6th $50, in response to such demands. After the 6th of August *Mr. Collins* failed to send any further margins, and on the 19th of August the plaintiffs bought in 2,000 bushels of December wheat at $.89⅛ and closed the transaction. No wheat was actually delivered upon these purchases. The trade was claimed to be closed up under certain rules of the Chicago Board of Trade, which were offered in evidence and received under objection, which rules, the plaintiffs claim, authorized the closing up of trades upon failure to deposit sufficient margins in the manner as was done in this case.

The defendant's claim was that the whole transaction was a gambling transaction; that there was no intent either on the part of himself or of the plaintiffs to deliver a single bushel of wheat. The laws of the state of Illinois upon the subject were not introduced in evidence. The court instructed the jury, among other things, that the defendant

had the burden of proof to satisfy them by the greater weight of evidence that both parties intended to make a gambling or wagering contract, to which instruction the defendant duly excepted.

A special verdict was returned, in which it was found, in answer to appropriate questions, that both the plaintiffs and the defendant in good faith intended and expected an actual delivery of wheat under the two sales, and that the plaintiffs' damages were $182.53. From judgment in accordance with this verdict the defendant appeals.

M. C. Mead, for the appellant.

For the respondents there was a brief by *Moe & Hansen*, and oral argument by *Otto Hansen*.

WINSLOW, J. This is an action by brokers to recover of their principal their commissions and moneys advanced by them in selling grain for the principal. Both brokers and principal reside in this state, and the verbal order or commission given by the principal was given in this state, and any liability resulting from the contract on the part of the principal was evidently to be discharged in this state. It was contemplated, however, by both parties that the transaction in grain, whether a real one or only a speculative one, should take place in Chicago. This is certain, because the plaintiffs so testify, and the defendant by his answer alleges that the intention was to wager in the market price of wheat at the Chamber of Commerce in Chicago.

The question whether this contract was an Illinois contract or a Wisconsin contract is an important one in the case, but it has received little attention in the briefs, although the plaintiffs claim that a verdict should have been directed in their favor, because the sale of the wheat was to be made, and in fact was made, in Chicago, and the laws of Illinois with respect to gambling transactions were not introduced in evidence. It does not clearly appear what view the trial

judge took of the question, although he instructed the jury, in accordance with the law of this state, in effect, that if both parties intended the transaction to be a mere wagering contract on the price of wheat, without intention to deliver the wheat, but simply to settle by payment or receipt of differences, then the contract was void. Stats. 1898, sec. 2319*a*; *Wall v. Schneider*, 59 Wis. 352. Whether this instruction was based on the idea that the contract was a Wisconsin contract and governed by Wisconsin law, or that, if it was an Illinois contract, then that the law of Illinois would be presumed, in the absence of proof, to be the same as the law of Wisconsin, is not apparent. If it was an Illinois contract, it would seem at least extremely doubtful whether any presumption would be entertained that the law of Illinois was the same as the law of Wisconsin on the subject. It has been held by this court (*Hull v. Augustine*, 23 Wis. 383) that such a presumption will not be indulged as to a statute imposing a penalty or a forfeiture, as in the case of usury laws. But, however this may be, we are of the opinion that the contract between plaintiffs and defendant was a Wisconsin contract, though the sale of grain was to be made in Chicago.

The question as to what law is to govern a contract is not always an easy one to decide. As a general rule the construction and validity of a purely personal contract depend on the law of the place where made. Story, Conflict of Laws, § 272. If, however, the contract is made in one place, to be performed in another, then, as a general rule, the place of payment or performance is the place of the contract. 2 Parsons, Cont. (8th ed.), 583; *Newman v. Kershaw*, 10 Wis. 333. This rule is founded on the idea that, in making a personal contract to be fully performed in another state, the parties must have had the law of that other state in view. *Shores L. Co. v. Stitt*, 102 Wis. 450. But if the contract is to be partly performed where made, and partly

in other countries or states, the law of the place where it is made will still govern, unless a clear mutual intention is manifested that it shall be governed by the law of some other country. *Liverpool & G. W. S. Co. v. Phenix Ins. Co.* 129 U. S. 397. Thus, it was held in *Morgan v. N. O., M. & T. R. Co.* 2 Woods, 244, that, where a contract was made in one state to be partly performed there and partly performed in several other states, the contract, so far as it is personal in its nature, was to be governed by the law of the state where it was made. In the present case, the contract in question is the brokerage contract by which the defendant employed the plaintiffs to sell wheat for him in Chicago, and agreed to pay the plaintiffs their commissions for such service and indemnify them against loss. Both parties lived in Wisconsin, and the contract was made here. It is true that one act under the contract was to take place in Illinois, but all other acts, including the payment by the principal of all obligations incurred to his agents, were manifestly to take place in Wisconsin. Under the rules stated, it seems certain that it should be held to be governed by the law of Wisconsin.

But even were it held to be an Illinois contract, it is not seen how the result would be different. It is a universal principle that the courts of no state will hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates a public law. 2 Kent, Comm. (14th ed.), 458, and cases cited in note "d." So, in either event, if the alleged sale of the grain was in fact no sale, but only a gambling transaction, and so intended by both parties, then the contract before us can be the foundation of no rights in our courts.

Certain rules of the Chicago Board of Trade were received in evidence against defendant's objection, and this ruling is now assigned as error. It is unnecessary to recite the rules at length, but it is sufficient to say that they pur-

port to give to members of the board, whether buyers or sellers, the right to demand of the other party to such sale or purchase the deposit of ten per cent. as security, and further security from time to time as the market price of the commodity sold varies, and also the right of resale or repurchase in case of failure to deposit the security as demanded. It is sufficient to say with regard to this ruling that we think sufficient foundation was laid for the reception of the evidence. The plaintiffs, by their agents, offered testimony to show that the understanding was that the sale was to be made on the Chicago Board of Trade. The answer of the defendant, while claiming that the transaction was intended to be a gambling transaction, specifically alleges that it was to be a wager on prices of wheat at the Chicago Chamber of Commerce, which, we suppose, refers to the same institution as the Board of Trade. It is entirely clear that if the trade, whether real or speculative, was authorized to be made on the Board of Trade, it was intended to be made pursuant to the rules of such Board. The party who authorizes such a transaction to be made under the auspices of a particular organization, like a board of trade, impliedly submits himself to the lawful rules of the organization.

The court charged the jury, in effect, that the defendant had the burden of proof to show by the greater weight of evidence that both parties intended the transaction to be a gambling or wagering contract, and unless he did so the defense failed; and to this instruction the defendant excepted.

The instruction was erroneous for two reasons: first, it was an instruction applicable only to a general verdict, and the case was submitted to the jury upon a special verdict; second, it is contrary to the rule laid down in *Bannard v. Backhaus*, 52 Wis. 593. In that case it was held that, to uphold such a contract (i. e. a time contract for the sale and

delivery of grain upon a board of trade), it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. This rule has not been departed from, so far as we can ascertain, in this court. It is not, in our judgment, unreasonable. It is based on the well-known fact that a very large majority of the transactions on such boards are not real transactions, but simply betting on future prices. The reasons for the rule are closely analogous to those which sustain the well-known rule that where voluntary transfers of property are made by aged persons to one occupying a position of trust and confidence, under circumstances of secrecy, the burden is upon the grantee to show that the transaction was free from fraud. *Doyle v. Welch*, 100 Wis. 24. We are aware that many courts do not approve this rule, but it has been definitely approved by respectable courts. *Sprague v. Warren*, 26 Neb. 326; *Cobb v. Prell*, 15 Fed. Rep. 774; *Wheeler v. McDermid*, 36 Ill. App. 179.

It has been suggested that the statute (sec. 2319*a*, Stats. 1898) which was passed after the decision in *Barnard v. Backhaus* has changed the rule, but we have discovered no words in that statute which indicate an intention to change the rule of evidence. It would have been very easy to express such intention in unmistakable terms if it existed.

For the error in this instruction there must be a new trial. It does not seem necessary to discuss other errors alleged.

By the Court.— Judgment reversed, and action remanded for a new trial.

CASSODAY, C. J. I concur in the reversal of this judgment, but solely on the ground that an instruction applicable to a general verdict was given, whereas the case was submitted to the jury on a special verdict, contrary to the rule as held in *Ward v. C., M. & St. P. R. Co.* 102 Wis. 215, and subse-

quent cases. I cannot concur, however, in the proposition that the trial court committed an error in charging the jury to the effect that the burden of proof was upon the defendant to satisfy them by the greater weight of evidence that both parties intended to make, and did make, a gambling or wagering contract by and through the transactions in question.

It is conceded in the opinion filed that the contracts were valid, unless both parties intended the transactions to be mere wagering contracts on the price of wheat, without intending to deliver the same, but simply to adjust the differences by payments or receipts; citing *Wall v. Schneider*, 59 Wis. 352. The s ctions of the statutes referred to in that case are highly penal. Secs. 4424, 4425, 4532, 4535, 4538, Stats. 1898. They not only render all wagering contracts void, but punish the offending parties and authorize the recovery back of the money paid thereon. So far as I am aware, the rule is universal that a party seeking to bring a given transaction with the opposite party under the condemnation of such penal statutes has the burden of proving it. The principle is stated by Lord Chief Justice COKE as follows: "It is a general rule that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." 1 Co. Litt. 42b. So in this country it is held to be "a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted." *Hobbs v. McLean*, 117 U. S. 576, and numerous authorities there cited. The same rule has been applied to alleged wagering contracts. *Bigelow v. Benedict*, 70 N. Y. 205.

The latest edition of the American & English Encyclopedia of Law states the rule thus: "(3) The real test whether

the ostensible contract is or is not a gambling contract is a question of fact, and, if the evidence is conflicting, it is for the jury, under proper instructions from the court, to determine. (4) The burden of proof in actions on these contracts is upon the party alleging that the transaction is illegal and a gambling contract." 14 Am. & Eng. Ency. of Law (2d ed.), 618. In support of such proposition numerous cases are cited from seventeen different states, besides several from the federal courts. I have only examined a few of them, but those and others I have examined support the text.

Thus, it is held that, "in the absence of evidence to the contrary, it will be presumed that the contract was made in good faith, with intent on the part of both parties to perform." *Bigelow v. Benedict*, 70 N. Y. 202. To the same effect is *Story v. Salomon*, 71 N. Y. 420, 422, where it is said: "We may guess that the parties were speculating upon the fluctuations in the price of the stock, and that the defendant was not to be required to take or deliver any stock in any case, but simply to pay differences. But a contract which can have legal interpretation and effect should not be condemned without any proof, in that way. To the same effect, *Harris v. Tumbridge*, 83 N. Y. 93. So it has been held in Alabama that where, "by the terms of the contract, defendant agreed to deliver the stock, and plaintiff agreed to accept a delivery, the contract is *prima facie* valid, and the defendant on whom rests the burden of proof has failed to show any understanding or intent that there should be no delivery." *Perryman v. Wolffe*, 93 Ala. 291. So, in Missouri, it is held that "the burden of showing the invalidity of the contract rests upon the party asserting it." *Crawford v. Spencer*, 92 Mo. 498, 502. So, in New Jersey, it is held that "the burden of proving that transactions relating to the purchase and sale of stocks which are in form transactions between the customer, as principal, and the broker, as agent, are wagering contracts, *rests on the party* asserting

their illegality." *Pratt v. Boody*, 55 N. J. Eq. 176. To the same effect, *Beadles v. McElrath*, 85 Ky. 230, 238. So, it has been held in Illinois that "where the maker of a promissory note seeks to avoid the same on the ground that its consideration was illegal, the burden of proof is upon him to show the fact by a clear preponderance of the evidence." *Pixley v. Boynton*, 79 Ill. 351. That case related to a transaction on the board of trade. To the same effect is *Scanlon v. Warren*, 68 Ill. App. 213, affirmed in 169 Ill. 142. See, also, *Gaw v. Bennett*, 153 Pa. St. 247, 255. Thus, in Minnesota it is held that "the burden of establishing the illegality of such transactions rests upon the party who asserts it." *Mohr v. Miesen*, 47 Minn. 228. See, also, *Rountree v. Smith*, 108 U. S. 269, 276; *Irwin v. Williar*, 110 U. S. 499, 507, 510; *Bibb v. Allen*, 149 U. S. 492. In these cases it is held by the highest court in this country to be "well settled that the burden of proof is upon the party who seeks to impeach such transactions by showing affirmatively their illegality." In my judgment, there is no well-considered case holding a contrary rule.

But it said that this court is committed to a contrary ruling in *Barnard v. Backhaus*, 52 Wis. 593. That case was decided a few months before I became a member of the court, and a memorandum of the decision was made by the late Chief Justice RYAN, but he died before writing an opinion, and no opinion was written until a year afterwards. The syllabus to that case is, to my mind, misleading. It may be inferred from it that a contract for the sale and future delivery of grain, for a price certain, is presumptively a wagering contract. But that is contrary not only to the memorandum filed, but also to the opinion in the case; for it is declared in both that such contract, made with the "*bona fide* intention to deliver," is valid. To that statement the opinion by Chief Justice COLE adds: "Such contracts are constantly made in legitimate transactions, and are unob-

jectionable in law." Page 598. It is then said in the memorandum: "But when such contracts are made as a cover for gambling, without intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, they come within the statute of gaming, and are void in law. To uphold *such a contract* it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as an evasion of the statute of gaming, or as a cover for a gambling transaction." Page 597. In neither of the three cases cited by Chief Justice COLE do we find anything to support the alleged presumption of illegality. On the contrary, he quotes approvingly from the Pennsylvania case the following: "We must not confound gambling, whether it be in corporation stocks or merchandise, with what is commonly termed 'speculation.' Merchants speculate upon the future prices of that in which they deal, and buy and sell accordingly. In other words, they think of and weigh — that is, speculate upon — the probabilities of the coming market, and act upon this lookout in the future in their business transactions; and in this they often exhibit high mental grasp and great knowledge of business and of the affairs of the world. Their speculations display talent and forecast, but they act upon their conclusions, and buy or sell in a *bona fide* way." Pages 598, 599. He then adds: "But when such a contract is made as a cover for gambling, without any intention to deliver and receive the grain, but merely to pay and receive the difference between the price agreed upon and the market price at such future day, then it comes within the statute of gaming, and is void in law." Page 599. This left it for the party alleging such gambling contract to prove such facts.

It will be observed that that case did not turn upon a charge of the court as to the burden of proof, as here, nor

upon a ruling as to the admission of evidence. On the contrary, the jury was waived and the case was tried by the court, and came to this court upon the findings of the trial court and the evidence. The conclusion of this court from such findings and evidence, as indicated in the memorandum filed, is summed up by Chief Justice COLE in these words: "It is sufficient to say that the court deems it clearly and satisfactorily proven that in respect to some of the transactions none of the parties intended an actual sale and purchase of the wheat, 'but that the whole thing was to be settled by the payment of differences.'" Three years afterwards this court had occasion to review that case; and with the concurrence of all the members of the court who made that decision, except the late Justice ORTON and Chief Justice RYAN, who had since died, it was said that the language quoted stated "the ground for holding the note void in that case." *Wall v. Schneider*, 59 Wis. 354. In that case a judgment based upon a verdict directed in favor of the plaintiff was affirmed on the ground that it appeared from the evidence, "conclusively, that the seller intended in good faith to deliver the commodities sold." I certainly did not then understand, and do not now understand, that this court had held that an executory contract for future delivery was presumptively a gambling contract. Such contracts are constantly being made in respect to all kinds of commodities and in all lines of business. I am unwilling to presume that such contracts are void merely because they relate to transactions upon some board of trade. We may have a suspicion that many of such transactions are entered into without any intent on the part of either party that the commodity contracted for should actually be delivered; and yet all must admit that there are legitimate transactions upon the boards of trade every month, if not every week, amounting to millions. Certainly there is no good ground for presuming that all parties to such transactions are outlaws, nor that the

burden of proof should be upon any to prove their innocence. The law is no respecter of persons, and in my judgment the law when applied to a given transaction upon the board of trade is the same as when applied to a like transaction occurring elsewhere.

DODGE, J. I concur in the position and views declared in the foregoing opinion by the chief justice.

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109	490
112	[2]414
109	490
114	[6]852
109	490
[1]116	[4]461
116	[4]464

CONSOLIDATED WATER POWER COMPANY, Respondent, vs. NASH, Appellant.

SAME, Appellant, vs. SAME, Respondent.

February 6 — March 19, 1901.

Corporations: Officers: Authority to convey entire property: Contracts: Arbitration: Signatures: Withdrawal: Mistake vitiating award: Specific performance: Judgment.

1. The president and secretary of an active manufacturing or business corporation have no power to make a contract on its behalf for the conveyance of its entire operating plant, without the sanction of the stockholders in meeting assembled, especially when the contract is also to subscribe for, and accept payment in, the stock of another corporation.
2. Where a contract provides that it shall not be binding upon either or any of the parties thereto until signed and executed by persons and corporations named therein, any party has an option to withdraw before the contract has been signed and executed by all of such persons and corporations, and may effectively exercise such option by notifying all the parties interested of his refusal to be bound by the contract or to participate further in the scheme contemplated thereby.
3. Where one of the signatures required by the terms of such contract before it shall take effect is that of "C. as administrator of the estate of B.," signature by C. in that form is sufficient, and an authoritative execution on behalf of the estate of B. is not necessary to make the contract effective. [Whether, however, there is thus created sufficient mutuality of effective obligation to warrant the compelling of specific performance, not determined.]

4. Where the names of certain corporations had been signed to such a contract without authority, ratification of such signatures by the stockholders of the corporations after one party had exercised his option to withdraw could not affect the latter or create any liability against him.
5. The mistake which can vitiate an award of arbitrators is not a mistaken conclusion upon a question of fact or of law which they considered and decided, but an unconscious failure to know or apprehend some material fact or right, in the light of which their judgment should have been exercised.
6. Several owners of mill plants and of lands which would be affected by the improvement of the water power of a river agreed to convey their properties to a corporation formed to effect such improvement, and to accept in payment therefor such amount of the stock of said corporation as should be apportioned to each by a board of arbitrators. Construing such contract in the light of the situation and of other facts (more fully stated in the opinion) it is *held* that the apportionment of stock was to be made according to the money values of the various properties, and hence that an apportionment or award based solely upon the proportionate number of feet of fall in the river opposite each of the several properties does not embody any decision of the arbitrators upon the question submitted to them and is not binding.
7. The parties to said agreement being under no obligation to convey to the corporation until there had been a proper award by the arbitrators, it was error for the court, in an action by the corporation to compel specific performance by one of the parties, to determine the number of shares to which the defendant was entitled, in the light of the evidence as to market values, and to order a conveyance upon delivery of said shares.

APPEALS from a judgment of the circuit court for Wood county: O. B. WYMAN, Judge. *Reversed on both appeals.*

This suit, brought by the plaintiff to compel specific performance by the defendant of a contract to convey certain lands and water power in the Wisconsin river, near Grand Rapids, presented substantially the following facts, either undisputed or found by the court upon sufficient evidence:

In 1894 various interests in lands, riparian easements, and water powers existed in the vicinity of Grand Rapids and Centralia, which, however, utilized but a part of the power

of the water there flowing, of which further utilization and development was also obstructed by the conflicting rights of different owners. On July 16th of that year some eight or ten of these owners had prepared a written agreement reciting the belief "that the water power at said cities would be of more value if consolidated and improved upon one general plan with reference to the value of the whole water power," and declaring that they agreed with each other to convey all their respective interests in lands, riparian rights, and water power, including dams, mills, mill machinery, and personal property, specified in schedule, to a corporation to be formed and to be called *Consolidated Water Power Company*, "and to take in consideration of such conveyance and for the same such share in the stock of said corporation as shall be apportioned to each of us by a board of arbitrators on account of our respective separate interests and ownership in said lands, riparian rights, and water power, and other property above specified." Then followed a description of the property and the names of the arbitrators, and the contract continued:

"We agree to abide by the decision of said board of arbitrators, and to take such amount of stock in said corporation as such board shall award to each of us on account of our conveyance of our interest in said properties. . . . The conveyance to be made in execution of this agreement shall be made when called for by the company to be formed. . . . The said board of arbitrators shall place a separate valuation upon the water wheels, shafting, machinery, and mill buildings, and personal property of each of the undersigned, not including the foundation."

Each was to have option to remove such property within a limited time, "the same to be kept by him at the valuation fixed upon the same by the board of arbitrators." The proposed agreement concluded:

"This agreement shall not be binding upon either or any of the parties thereto until it is signed and executed by the following named persons and corporations, to wit, W. E.

Mack and C. A. Spencer, *Thomas E. Nash*, and John L. Nash, B. G. Chandos and B. G. Chandos as administrator of the estate of Marian L. Bensley, deceased, the Wisconsin Wood Pulp Company, the Grand Rapids Water Power Company, and the Pioneer Wood Pulp Company, F. MacKinnon, and C. A. Spencer; and when so signed and executed the same shall be binding upon each and every one of said parties and their respective legal representatives, heirs, successors, and assigns."

This writing was signed by all the individuals mentioned in said last paragraph, and to it were subscribed the names of the Wisconsin Wood Pulp Company, by W. E. Mack, secretary, and C. A. Spencer, president, Grand Rapids Water Power Company, by C. A. Spencer, secretary, and F. MacKinnon, president, and Pioneer Wood Pulp Company, by F. MacKinnon, secretary, and Geo. E. Hoskinson, president; such signatures being made by the respective officers without any authority from the stockholders of the respective corporations in meeting, and without any authority from directors of the Grand Rapids Water Power Company.

On July 28th following, a number of the signers of that agreement executed formal articles of incorporation of the *Consolidated Water Power Company*, and caused the same to be filed, and a certificate to be procured from the secretary of state; but no further steps were presently taken towards organizing or launching such corporation. On February 13, 1895, the above-named arbitrators called together all of the individuals whose names are subscribed to the agreement of July 16, 1894, and announced their award, together with the basis on which the same had been made. At that time the defendant and his brother, John L. Nash, who was then associated with him in the ownership of the property now in litigation, being dissatisfied both with the result of the said award and with the conduct of the arbitrators, announced that they withdrew from the agreement of July 16, 1894, and would proceed no further with it. Notwith-

standing this announcement, an attempt was made on the 20th of February to hold a meeting of all the subscribers to that agreement as a meeting of stockholders to organize the plaintiff corporation, notice being served on defendant and his brother. They attended at the time of that meeting, and reiterated their declaration that they repudiated and withdrew from the agreement of July 16, 1894, whereupon they left the room, and thereafter had no participation in any further proceedings of the plaintiff corporation or of its members. Quite immediately thereafter attempted subscriptions to the capital stock of the plaintiff corporation by the other signatories were had, and attempted conveyances of the various parcels of real estate, the conveyances by the three signatory corporations being executed without express authority of any stockholders' meeting. At some later date — apparently without formal action — the capital stock of the plaintiff, which was issuable to these three corporations, was distributed among their stockholders except as to one stockholder in the Pioneer Wood Pulp Company, to whom none was ever distributed, and who is not shown to have participated personally in any of the proceedings. The title of the property of the Bensley estate never was attempted to be transferred by the administrator, but under a mortgage foreclosure judgment standing against it a sale was made, and the property bid in by a stranger to the record, and by him conveyed to the plaintiff, and stock issued to him therefor.

On June 15, 1895, suit was commenced by the plaintiff against the defendant and his brother, John L. Nash, for specific performance, and to compel conveyance of their property in accordance with the agreement of July 16, 1894. On the trial of that action it transpired that the title to the Bensley estate property was incomplete, and the plaintiff, on the 30th day of October, 1895, took a judgment of nonsuit without prejudice. Thereafter attempts were made to

perfect the Bensley title, which terminated as early as June 29, 1897. No intimation was given to the defendant or his brother of a purpose to insist further on their liability to convey their property. On the 18th of April, 1899, the defendant purchased his brother's half interest therein for $9,500. On June 17, 1899, the mill and machinery were destroyed by fire, and insurance to the extent of $5,500 paid to the defendant, and he was negotiating for the erection of a paper-bag factory on the property, when he was interrupted by the commencement of the present action.

Additional facts relevant to the questions decided will be found in the opinion. The judgment repudiated the award of the arbitrators as not in accordance with the submission to them, and as fixing an inadequate price or proportion for defendant's property, and decreed specific performance, requiring, however, that the plaintiff deliver to the defendant 342 shares of its stock, instead of the 135 shares apportioned to him by the appraisers. From the whole of this judgment the defendant appeals, and from that portion requiring the delivery of 207 shares of stock in addition to the award of the appraisers the plaintiff appeals.

Geo. L. Williams, attorney, and *B. W. Jones*, of counsel, for the plaintiff.

B. R. Goggins, attorney, and *W. F. Vilas*, of counsel, for the defendant.

DODGE, J. The defendant on his appeal contends that he never became bound by the alleged contract of July 16, 1894, for the reason that he withdrew at a time when he had a right so to do, and before the contract had become complete and obligatory upon him. That contract, by its very terms, provided that it should not be binding upon either or any of the parties thereto until signed and executed by a list of persons and corporations named. Obviously it was an incomplete instrument until that clause was

satisfied. Until then none of the parties was irrevocably committed to his decision to become a party to that agreement. It was ambulatory, and, up to the time when the last of the parties named had signed and executed, each of the others had a right to change his mind and withdraw his assent thereto. This proposition is not controverted by either party; as, indeed, it could not well be.

Thereupon arises the inquiry whether, on the 13th day of February, when the defendant exercised his election to withdraw, and gave notice of such decision to all of the interested parties, the contract had been signed and executed by all those named. On that date there had been subscribed to the paper the names of all such parties, including the name of B. G. Chandos as administrator of the estate of Marian L. Bensley, and the names of the three corporations the Wisconsin Wood Pulp Company, the Grand Rapids Water Power Company, and the Pioneer Wood Pulp Company, in the form described in the statement of facts. The defendant contends nevertheless that it had not in fact been executed by any of the four. With respect to the Bensley estate, we think the defendant's position not well taken, for the purposes, at least, of the present question. The paper was to take effect, according to its terms, when signed and executed, not authoritatively on behalf of the estate of Marian L. Bensley, but "by B. G. Chandos as administrator." The parties had a perfect right to agree to accept Mr. Chandos's signature as satisfying the conditions upon which the contract should become effectual, assuming, or taking the chance, that, if he so signed, he would be able to effect a conveyance of the property of the estate. These views are expressed merely with reference to the efficacy of his signature to bring the paper into existence as a contract. Whether thereby was created sufficient mutuality of effective obligation to warrant specific performance need not now be discussed.

As to the corporations, however, a different situation exists. It is shown that in each case the agreement bound substantially the entire plant of each of the three manufacturing corporations, leaving them substantially no property with which to do business. It is shown that one, at least, would be deprived of all property except bills and accounts receivable. It is not indicated that they were other than going, active corporations. The subscribing of the corporate names to this document by the president and secretary of each was done without any showing or pretense of actual authority either in by-laws or vote of stockholders, except that in the case of two there were votes of directors authorizing or ratifying the execution of the agreement.

It is a fundamental principle of the delegation of power and authority that the principal does not act at all when the delegatee's act is outside of the power conferred. For safety, this principle, of course, yields to meet cases of apparent authority and of ratification, of which, however, nothing existed on February 13, 1895. *Ford v. Hill*, 92 Wis. 188. If it was not within the authority of the president and secretary of either of these corporations to enter into this contract on behalf of the corporation, or to affix the corporate seal thereto, then the same had not been signed and executed by that corporation. The authorities seem to be unanimous to the proposition that it is not within the general power of president and secretary, nor probably even within the power of the board of directors, to convey away the entire manufacturing plant of a going corporation. The principle is that such act is not in the line of any business contemplated to be done by the corporation, it being in its essence the very negation of corporate business. 4 Thomp. Corp. §§ 4632, 4951; *Walworth Co. Bank v. Farmers' L. & T. Co.* 14 Wis. 325; *Northwestern F. Co. v. Lee*, 102 Wis. 426, 429; *Calteaux v. Mueller*, 102 Wis. 525, 529; *Stokes v. N. J. P. Co.* 46 N. J. Law, 237; *Tappan v. Warren F. C. S. Bank*,

127 Mass. 107; *Goodyear R. Co. v. George D. Scott Co.* 96 Ala. 439, 443.

So far as any light is thrown upon the subject by our statutes, the limitations on the power of officers over such conveyance are quite as restrictive as above suggested. By sec. 1748, Stats. 1898, corporations are restrained from mortgaging their entire plant except by consent of a majority of the stockholders. Sec. 1767 provides that the property of any corporation shall be used only for the purposes prescribed by its articles of association. By sec. 1775 a corporation is given the powers "necessary or proper to conduct the business or accomplish the purposes prescribed by its articles, but no other or greater; and may take by gift, devise, purchase or otherwise, and manage and hold, and may, *by a vote of a majority of the stock* given at any regular meeting or at any special meeting duly called for the purpose, sell and convey or authorize to be conveyed all or any portion of the property owned by it. . . . But no such corporation shall take or hold stock in any other corporation except upon and with the assent of the holders of three fourths of the capital stock of both the corporation proposing to take such stock and the corporation in which it is proposed to be taken." In the light of such restrictive provisions, we cannot doubt that an act so remote from the ordinary business of any manufacturing or business corporation as the disposal of its entire operating plant must have the sanction of the stockholders in meeting assembled, and that it is wholly beyond the power of the president and secretary to make a contract for such conveyance on behalf of the corporation without such authority; especially when, as here, it is a contract, not only to dispose of the plant, but, by the same instrument, to subscribe for and agree to accept payment in stock of another corporation.

We are constained to the conclusion that on February 13, 1895, the so-called contract of July 16, 1894, had not been

signed and executed by the three corporations whose names had been affixed thereto without authority, and that *locus penitentiæ* still remained for Nash & Nash to withdraw at their option; that they did so in an effective manner by notification to all of the parties interested of their refusal to be bound by the contract or further participate in the scheme contemplated thereby; and that, as to them, said instrument never became a binding contract.

Plaintiff argues that, although these corporations had not executed the agreement, all of their stockholders subsequently ratified it by assenting to conveyance of the real estate specified, and by individually accepting the capital stock of the plaintiff corporation. Even that fact is not established with reference to the Pioneer Wood Pulp Company, for it is shown without controversy that Mrs. Hoskinson was a stockholder therein, and that she never did receive any of the stock in the plaintiff company, and there is no evidence that she ever had knowledge either of this agreement or of a conveyance in pursuance thereof But all such discussion is apart from the question now under consideration, for the ratification, if any, did not take place until after Nash & Nash had exercised their election not to be parties to the agreement, and could not, therefore, serve to create an obligation which the defendant and his brother had never assumed.

2. It is also contended by the defendant that, even if he and his brother were bound by the contract of July 16, 1894, the three arbitrators therein named have never, in accordance with that instrument, apportioned the share in the contemplated corporation to which defendant and his brother were entitled as consideration for a transfer of their property. The argument upon this contention took a much wider range than is necessary for its decision. By the finding it is declared without exception that the arbitrators made their apportionment "by awarding to the several prop-

erties covered by said agreement of July 16, 1894, shares of the whole water power which they estimated could be produced and developed upon the river by the construction of a dam in proportion to the number of feet of fall in the river opposite each of the several properties, in the award of water-power value to such properties, and entirely disregarded the real market value of the same, except in reckoning wheels, machinery, and personal property." Whether this was a performance of the duty and authority committed to them depends first, of course, on the agreement of July 16, 1894, in the light of the situation and objects surrounding the making of it. The situation was the existence of a rapid and voluminous river, with a fall of some thirty feet in two and one-half miles above the business part of the now city of Grand Rapids, which, partly at least for the community's welfare, it was desired to develop; the existence of numerous mill plants equipped with water wheels, buildings, and machinery, doing considerable business, and having some measure of water head already established by wing dams, etc., and with tail race and escape facilities, located on land differing widely in sale values because of proximity to business parts of the city, to streets, or to railroads; and the existence of other lands on or near the river, varying from that available for mill plants or building lots to low-lying stump lands worth five dollars per acre, nearly or quite unavailable for any use, but likely to be flooded in any comprehensive effort to develop the water power. In this situation the parties, being owners of probably the major part of lands to be affected, and having in their several ownership all the varieties above outlined, entered into agreement to effect a general plan involving the damming of the river, with all the results of flooding some lands, destroying or impairing some sites and water powers, and greatly improving others, by organizing a corporation with power to develop the water power for the purpose of selling or leas-

ing, but not to own or operate mills and factories. To this end it was and would be necessary for such corporation to acquire by purchase or condemnation either the real estate to be affected by their enterprise or rights therein likely to be impaired. As a considerable nucleus of the property and rights so necessarily to be acquired, the parties proposed to convey what they owned without condemnation, and to accept pay in stock of the corporation. That was the essence of the agreement,—that each would sell for stock, instead of money.

In this situation, and upon such reasons and purposes, they stipulated as to a method of fixing the price of their respective properties by the written contract of July 16, 1894, in the terms set forth in the statement of facts. That contract provides that each shall accept as price "such share in the proposed corporation as shall be apportioned to him by the arbitrators." Does that mean to commit to that board authority to apportion according to whim or caprice, or according to *some* standard of proportion or relation? Hardly the former, for the result were too absurd for contemplation by business men dealing with property of actual value. If that be the construction, a simple division of the whole stock by seven, and apportionment of one seventh to each, would have bound them, although the properties vary in value from $1,600 to $35,000. Or even a lottery scheme, by which the grand prize of half the stock might be awarded to the owners of the $1,600 property, would be within the submission. Such purpose is not supposable. Some standard must have been contemplated and intended to control the apportionment. That being so, the standard contemplated cannot be in doubt. There is but one in any wise consistent with the situation, or with the provisions of the contract itself, and that is the standard of the money value of the real estate to be conveyed. This is primarily apparent from the contract itself, for, after

deciding the portion of stock which each was to receive, the arbitrators were to place a "separate valuation" on part of it, namely, the buildings, machinery, etc., which the owner might retain, deducting such valuation from the stock apportioned for his entire property; thus presenting the impossible mathematical problem of subtracting money value from feet fall of water, or some other commodity, if the general apportionment were not also according to money value.

Again, the contract required each owner to take the awarded share of the corporation in capital stock, which by law can issue only on the basis of money value. Still again, as confirmation of the meaning of all the parties, it is in evidence that in arranging the corporation they each fixed an estimate of *value* on their respective properties, which was assumed as the probable approximate amount of stock at par which would be distributed among the original contractors; and the total stock was made enough larger to supply a further quantity to be sold for money with which to build dam and pay other expenses,—a wholly unfeasible project if the signatories' properties were to be turned in without any relation to money value.

Further, it is apparent from the situation and the objects in view that a basis by which property was to be acquired by the corporation with regard only to foot fall of river appurtenant to it would never have been assented to by those owning small, but valuable, properties. One hundred and sixty acres of stump waste land, having half a mile of river frontage and many feet fall, could be acquired by purchase (perhaps by condemnation) for a mere fraction of the cost of a valuable piece of mill property in the business part of the city, though the latter have but a few rods frontage and a few inches river fall contiguous thereto. It is too unreasonable for belief that the owners of the latter would enter into a corporation bound in advance to purchase the former

class of properties at many fold the price at which it could be condemned or purchased.

We cannot avoid the conclusion that the clear and obvious construction of the contract between the parties defines and limits the submission to the arbitrators to an apportionment according to the money values of the various properties, and the question is whether the award can, in any reasonable sense, be considered a decision within that submission. Can it be said that the arbitrators have exercised or attempted to exercise their judgment upon the question submitted to them? If it can, their award must stand as fixing the price of each parcel just as fully and finally as if the amount fixed by them had originally been agreed on by the parties and written into their contract,— subject, of course, to impeachment of the award for fraud, misconduct, or mistake. We may freely concede that the award is none the less binding because the arbitrators have erred in judgment upon any question of fact or law submitted to them for judgment. Such errors are among the contingencies which parties assume when they select such tribunals. The mistake which can vitiate an award is not a mistaken conclusion upon facts or law which are considered and decided upon, but an unconscious failure to know or apprehend some material fact or right in the light of which their judgment should have been exercised. To these propositions decisions from other courts hardly need to be cited. Our own are clear. *Early v. Chippewa L. Co.* 68 Wis. 112; *Wood v. Treleven*, 74 Wis. 577; *Stubbings v. McGregor*, 86 Wis. 248; *Wendt v. Vogel*, 87 Wis. 462; *Burnham v. Milwaukee*, 100 Wis. 55, 67; *McAlpine v. St. Clara F. Academy*, 101 Wis. 468; *John Pritzlaff H. Co. v. Berghoefer*, 103 Wis. 359, 364. But when arbitrators fail to decide the question submitted to them they indeed make no award. Parties who agree to submit their rights to the judgment of any tribunal upon a specified question or conditions cannot be affected by its views on other and different

ones. *Early v. Chippewa L. Co.* 68 Wis. 117; *Stubbings v. McGregor*, 86 Wis. 252; Morse, Arbitration, 259; *Allen v. Galpin*, 9 Barb. 246; *Gear v. Bracken*, 1 Pin. 249. It matters little what designation be given such procedure as here presented,— whether it be termed a departure from the submission, a mistake in supposing a wrong standard or measure to be the correct one, or misconduct,— the result is the same, and their so-called "award" is as if not made.

The conclusion from the foregoing is obvious and inevitable. Having agreed only to be bound by the judgment of the arbitrators as to the relative money value of the various properties, the defendant is not bound by nor concerned in the result of their judgment as to the proportion of feet fall, nor even of estimated water power physically appurtenant to each. Had the arbitrators, in the exercise of their judgment, concluded that the money value of each property was in fact measured by its appurtenant horse power, erroneous as such view would be, a different situation would be presented; but they have not done this, as appears by the finding, and even more clearly by some of the testimony. They allowed to each property the number of feet fall of the river adjoining its frontage, which they computed into proportionate horse power upon a basis of assumption of total horse power, the correctness of which they did not decide, as they were seeking only proportions; then multiplied the horse power by $25, to ascertain the par value of stock to be apportioned. The $25 was adopted arbitrarily and without considering whether it even approximated the money value. One of the arbitrators testified that they might just as well have used $100 as the multiplier, as it would have preserved the relative proportions. This method is illustrated and emphasized by many other facts in the record, recitation of which is not necessary. They only serve to sustain and illustrate the finding and to confirm the conclusion that the so-called "award" embodies no decision by the arbitrators upon the question submitted to them.

We are therefore led, necessarily, to hold that plaintiff has failed to show even any legal obligation resting on defendant to convey his property to it, for that he never became bound to the alleged contract of July 16, 1894, and for that the share in the plaintiff corporation, upon tender of which in capital stock his property was to be conveyed, has never been determined by the arbitrators, within the terms of that agreement Judgment dismissing the complaint must be directed on these grounds, and we need not discuss the very numerous and cogent equitable considerations which defendant urges against the enforcement of specific performance.

3. On plaintiff's appeal our attention is drawn to a portion of the judgment which we are quite willing to believe is without precedent, as counsel assert, and which finds no apologist on either side. After reaching the conclusion that the award was not such as the defendant was bound to accept, and that no obligation rested upon him to convey for the consideration so ascertained, the court proceeded to fix a price with apparently no justification save that deemed reasonable in light of the opinion evidence as to market values, and to decree specific performance upon payment of 342 shares of stock, instead of the 135 shares fixed by the arbitrators. It is an imperative condition of the equitable jurisdiction to decree conveyance in specific performance of a contract that there should be at least a legally binding contract to convey. The only contract attempted to be proved was one to convey at a price to be fixed by arbitrators. Until such price had been fixed, there could be no obligation, either on the one side to convey, or on the other to receive, upon any terms. Neither had the defendant agreed to sell, nor the plaintiff to purchase, at any other price, be it reasonable value, or assessed value, or a value to be ascertained by the court. If the written contract did not bind according to its terms, it did not bind at all. In such

a situation, even a court of equity cannot attempt so daring a flight as the making of a contract between the parties and compelling them to specifically perform it. Such was the effect of the portion of the judgment requiring the delivery of 342 shares of stock as condition of defendant's conveyance, which, therefore, is clearly erroneous, and must have caused reversal had the plaintiff only appealed.

By the Court.—Judgment reversed on both appeals, and cause remanded with directions to enter judgment dismissing the complaint. In taxing plaintiff's costs on its appeal, not more than $25 will be allowed for printing.

BARDEEN, J., took no part.

THE STATE VS. MCDONALD.

February 9 — March 19, 1901.

Criminal law and practice: Constitutional law: Trial: "District" where offense is committed: Illegal fishing: Catching fish for spawn: Agent of fish commissioners.

1. Sec. 8, Stats. 1898 (giving to the counties bordering on the shores of Green Bay jurisdiction in common of all offenses committed on that part of said Green Bay which lies within the limits of this state), is not in violation of sec. 7, art. I, Const., providing that in all criminal prosecutions by indictment or information the accused shall enjoy the right to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.
2. K., the owner of certain fishing tugs, etc., entered into a written contract with the commissioners of fisheries, through the superintendent thereof, to furnish said fishing outfits for the taking of fish for spawn in one of the outlying waters of the state. Subsequently said superintendent, in writing, authorized K. to permit defendant with his fishing tug to take fish for spawn on the same conditions that K.'s tugs were allowed to fish. Such permit was not delivered to the defendant, but remained in the possession of K., who instructed defendant to take white fish for spawn and deliver them to the superintendent. Thereafter the defendant with

his tug engaged in taking fish which were turned over to the superintendent or his agent. Neither the superintendent nor his agent was ever present when such fish were taken, and on the day when the illegal fishing charged in the information was committed, both of them were absent from the place where they usually received the fish. The defendant, however, was complying in all respects with the conditions and requirements of K.'s contract with the commissioners. *Held*, that the defendant was an agent of the superintendent of fisheries, authorized in writing, within the meaning of sec. 15, ch. 311, Laws of 1899, authorizing the commissioners of fisheries, etc., to take fish at all seasons of the year from the outlying waters of the state for securing eggs for artificial propagation, etc., provided that "no such fish shall be taken except in the presence of the superintendent of fisheries or his agent authorized in writing."

REPORTED from the circuit court for Brown county: S. D. HASTINGS, JR., Circuit Judge. *First, second, and third questions answered in the affirmative; the others not answered.*

For the plaintiff there was a brief by the *Attorney General*, and oral argument by *R. F. Hamilton*, second assistant attorney general.

For the defendant there was a brief by *Sheridan & Evans*, attorneys, and *Calvert Spensley*, of counsel, and oral argument by *W. L. Evans* and *Calvert Spensley*. To the point that sec. 8, Stats. 1898, is unconstitutional, they cited *Dougan v. State*, 30 Ark. 41; *Buckrice v. People*, 110 Ill. 29; *State v. McGraw*, 87 Mo. 161; *In re McDonald*, 19 Mo. App. 370; *State v. Hatch*, 91 Mo. 568; *State v. Smiley*, 98 Mo. 605; *Armstrong v. State*, 1 Coldw. 338; *Craig v. State*, 3 Heisk. 227; *State v. Lowe*, 21 W. Va. 782, 45 Am. Rep. 570; *Olive v. State*, 11 Neb. 1; *Ex parte Crawford*, 12 Neb. 379; *State ex rel. Scott v. Crinklaw*, 40 Neb. 759; *Swart v. Kimball*, 43 Mich. 443; *State ex rel. Brown v. Stewart*, 60 Wis. 597; *In re Eldred*, 46 Wis. 548.

CASSODAY, C. J. The defendant having been tried and convicted of the offense charged, the presiding judge, before

sentence and judgment, certified to this court six questions of law which had arisen upon the trial, and reported the case to this court so far as is necessary to present such questions of law pursuant to sec. 4721, Stats. 1898, to the following effect:

The defendant was brought to trial in the circuit court for Brown county upon a plea of not guilty to an information charging him with a violation of sec. 4561*a*, Stats. 1898. That information was based upon a preliminary hearing had before one C. W. Lomas, a circuit court commissioner in and for Brown county, by whom the defendant was bound over to the circuit court for trial. It appeared from the complaint upon which the preliminary hearing was so had, and upon the trial, that the alleged offense was committed upon the waters of Green Bay, in Wisconsin, about four miles west of Washington Island, forty miles, at least, from the nearest point of Brown county, and five miles, at least, from the nearest point of any other county than Door, which facts were at all times known to the complaining witness. The commissioners of fisheries of this state, by and through their agent, James Nevin, the superintendent thereof, had theretofore entered into certain agreements with one Albert Kalmbach, of Door county, for the taking of fish for spawn for the commissioners, which contracts were to the effect that Kalmbach on his part agreed to furnish for the use of the commissioners in obtaining spawn of lake trout and white fish his three tugs therein named, and his sailboats and gill nets, with outfits, as required in the waters of Sturgeon Bay, Green Bay, and Lake Michigan, with men to run the same and operate the nets, during such times in October and November, 1899, as the superintendent should direct, for the compensation therein named; the fish caught to be disposed of to pay the expenses. No fishing was to be done except by direction of the superintendent, and solely for the purpose of obtaining spawn, and the expenses of catch-

ing fish were not to exceed the value of the fish when sold. On or about November 11, 1899, James Nevin, as such superintendent, delivered to Kalmbach a certain permit in writing, of which the following is a copy:

"Detroit Harbor, Wis., Nov. 11, 1899.

"This permit will authorize A. Kalmbach to allow the McDonald Bros., with the fish tug Fish Hawk, to set nets to catch white fish to get spawn on the same conditions that his tugs are allowed to fish. JAS. NEVIN,

"Supt. Fisheries."

Such permit remained in the possession of Kalmbach until after the time of the alleged offense. The defendant was a member of the firm of McDonald Bros., the owners and operators of the fishing tug known as the Fish Hawk. After such permit was delivered to Kalmbach, the McDonald Brothers, with such tug, engaged in taking fish from the waters of Green Bay for the purpose of obtaining fish spawn for such commissioners, and such fish and spawn were, as often as the boat landed, turned over to James Nevin, or his agent, Frank Suthers, an employee of the commissioners. Such fish were weighed by Nevin or Suthers, and delivered to Kalmbach, McDonald Bros. receiving from Kalmbach five cents per pound for all of the white fish so caught by them, and four cents per pound for all of the trout caught by them. On November 22, 1899, the defendant and his copartner, Charles McDonald, together with two men employed and paid by them, comprised the crew of the fish tug Fish Hawk. On that day they were fishing with nets for white fish in the waters of Green Bay, about four miles west of Washington Island. In fishing for white fish about 2,600 pounds of trout and about 500 pounds of white fish were caught by the crew. No spawn was taken. James Nevin was at the time in the general charge of the operations in Door county for the catching of spawn for the commissioners. He or his agent, Suthers, was usually stationed at Detroit Harbor, the point from which said boat

went out for fish, and to which it returned with such fish; and all fish so caught were received from the defendant by Nevin or Suthers at that point, where they were weighed and delivered to Kalmbach. On the day of the alleged offense Nevin was at the city of Green Bay, and his agent, Suthers, was at the city of Sturgeon Bay, neither of them being at Detroit Harbor, where the fish tug Fish Hawk landed, nor were they or either of them on the fishing tug Fish Hawk at any time during the fishing in question. After November 11, 1899, and before the commission of the alleged offense, Kalmbach instructed the firm of McDonald Bros. to go to work getting white fish for spawn for the commissioners, and to deliver the same to Nevin or Suthers, and at the time of the commission of the alleged offense the defendant was in all things complying with the conditions and requirements of the contracts.

There was no conflict in the evidence offered by the state and the defendant. At the close of the evidence upon the trial the court refused to allow counsel for the defendant, after request for such privilege, to address the jury, on the ground that under the undisputed facts in the case as appeared from the testimony introduced by the state and the defendant the defendant was shown and admitted to be guilty of the offense charged in the information, and thereafter instructed the jury, which instructions, together with the remarks of the court to counsel preceding the charge, are attached to and made a part of the report. Thereafter the cause was submitted to the jury, and, after retiring and deliberating, a verdict of guilty was found by them. A motion to quash the information on the ground that the court was without jurisdiction was made on behalf of the defendant before the entering of the plea of not guilty.

The questions of law so certified, and upon which answers are desired, will be stated in their order.

"*First.* Has the circuit court for Brown county jurisdiction of this prosecution?"

It is conceded that the offense, if any, was committed upon the waters of Green Bay, in Wisconsin, and about four miles west of Washington Island, in Door county, and at least forty miles from the nearest point in Brown county. This being so, it is contended that the circuit court commissioner of Brown county had no jurisdiction to cause the arrest of the defendant for such offense, and bind him over for trial in the circuit court for Brown county, and that that court got no jurisdiction to try the case. The question raised is of great importance, and has received careful consideration. The constitution of this state provides:

"The state shall have concurrent jurisdiction on all rivers and lakes bordering on this state so far as such rivers or lakes shall form a common boundary to the state and any other state or territory now or hereafter to be formed, and bounded by the same." Sec. 1, art. IX, Const. Wis.; *J. S. Keator L. Co. v. St. Croix Boom Corp.* 72 Wis. 88–99.

The statute provides:

"The counties now or hereafter organized on the shores of Green Bay shall have jurisdiction in common of all offenses committed on that part of said Green Bay which lies within the limits of this state. . . . And all offenses committed against this state on any part of said waters may be heard and tried in either of the counties having, as aforesaid, common jurisdiction over such waters where such offense may be committed in which legal process against the offender shall be first served, and may be alleged and shall be conclusively deemed to have been committed within such county; and all civil process from either of the counties aforesaid may be executed within and upon such waters as are within the jurisdiction of such county above given. In the construction of this section all wharves and piers shall be deemed part of the land with which they are connected." Sec. 8, R. S. 1878, and sec. 8, Stats. 1898.

The same section gives such common jurisdiction over offenses committed on the waters of Lake Michigan to the several counties bordering thereon, and over offenses com-

mitted on the waters of Lake Superior to the several counties bordering thereon, and over offenses committed on the Mississippi river to the several counties bordering thereon, and over offenses committed on the waters of Lake Winnebago to the several counties bordering thereon, and over offenses committed on the waters of St. Croix river and lake to the several counties bordering thereon. Thus it appears that six separate districts were created, and in each common jurisdiction over all offenses committed on the waters therein mentioned was given to the respective counties bordering thereon. Four of such districts were created immediately after the adoption of the constitution. Secs. 8–15, ch. 10, R. S. 1849, and secs. 8–15, ch. 13, R. S. 1858. The contention is that such statutes creating such districts and giving such jurisdiction in common in each are repugnant to the section of the constitution which declares that "in all criminal prosecutions" "by indictment or information" "the accused shall enjoy the right" "to a speedy public trial by an impartial jury of the county *or district* wherein the offense shall have been committed; which county *or district* shall have been previously ascertained by law." Sec. 7, art. I, Const. Wis.

If such contention is correct, then, as indicated, the legislation in this state has been at fault from the beginning. Other illustrations may be given. Thus the first legislature enacted that "counties organized for county, and not judicial, purposes" shall, when attached to counties organized "for judicial purposes, be deemed to be within the limits and part of the county to which they are attached." Sec. 3, ch. 10, R. S. 1849, and sec. 3, ch. 13, R. S. 1858. The same legislature also provided that "such portions of the state not organized into counties as are annexed to any organized county shall for judicial and other purposes be deemed to be within the limits and part of the county to which they are annexed." Sec. 4, ch. 10, R. S. 1849; sec. 4, ch. 13,

R. S. 1858. The same legislature also provided that "offenses committed on the boundary lines of two counties, or within one hundred rods of the dividing line between them, may be alleged in the indictment to have been committed in either of them, and may be prosecuted and punished in either county." Sec. 7, ch. 141, R. S. 1849, and sec. 7, ch. 172, R. S. 1858, and sec. 4618, R. S. 1878, and sec. 4618, Stats. 1898. So it has long been provided by statute that "whenever two counties are separated from each other by a river or a creek the middle of the main channel of such river or creek shall be the division line between them;" and "the counties so separated shall have common jurisdiction of all offenses committed on the waters between them, and all writs and process issued in any such county may be executed at any place on the waters of such river or creek opposite the county from which it was issued." Sec. 7, R. S. 1878, and sec. 7, Stats. 1898.

Shall all such legislation be condemned as unconstitutional and void? The adjudications in this state tend to support such jurisdiction. In *State v. Cameron*, 2 Pin. 490, the defendant was tried and convicted of manslaughter in Crawford county, where the offense was alleged to have been committed. The court simply held that there was no error in refusing to charge the jury to the effect that the defendant was entitled to an acquittal if they found that it had not been proved that the death took place in that county, and charging the jury, in lieu thereof, in effect, that it was sufficient if they found that the mortal wound was given in that county, and that the "deceased died anywhere upon the Mississippi within the jurisdiction of this state, and neither above nor below the county line bordering upon the river." This was put upon the ground that under the clause of the constitution quoted above the state had "concurrent jurisdiction" of the whole river bordering on this state. The question here presented did not arise in *State v. Pauley*, 12

Wis. 537, nor in *Wheeler v. State*, 24 Wis. 52, although Mr. Justice PAINE did comment on the use of the words "or district" in sec. 7, art. I, Const. Wis. The same is true of *In re Eldred*, 46 Wis. 530, where the offending milldam was miles distant from the county line, although Chief Justice RYAN indulged in some comments on the same clause of the constitution, and, among other things, said:

"The words 'county or district,' as used in the clause, must both be held to have a meaning and a use. It is unnecessary here to give an authoritative construction of the whole scope of the clause, but only so far as its construction is involved in the question under consideration. The legislature takes express power to provide by statute for trial of offenses in the county or district in which the offenses shall have been committed." Page 548.

And then, after referring to some of the sections of the statute quoted above, said:

"These sections were framed by very intelligent gentlemen, some of them being distinguished members of the bar, in the same year in which the constitution was adopted. And they are plainly founded on the clause of the constitution in question." Page 549.

So far as his remarks go, they tend to support the validity of such legislation. *State ex rel. Brown v. Stewart*, 60 Wis. 587, 595, 596. In this last case, and on the assumption that the offense was committed outside of Columbia county, and within 100 rods of the county line, it was held "that the courts of Columbia county had jurisdiction." Following the suggestion of Chief Justice RYAN, it was said in the same connection

—"that the words 'or district,' as used in this clause of the constitution, were intended by the framers of that instrument, and understood by all at the time, to mean something different than the word 'county,' as therein used; especially when taken in connection with the words 'which county *or district* shall have been previously *ascertained by law*.' From this it appears to be competent for the legislature to change the boundaries of the districts without changing the bound-

aries of the counties. . . . Giving to each such distinct meaning and use, and there seems to be no difficulty in holding that each criminal district, as ascertained by the laws now in force, extends one hundred rods beyond the boundaries of each county. . . . This constitutional provision does not undertake to define or limit the jurisdiction of the courts over criminal offenses, but simply defines and limits the locality from which a jury must be taken for the trial of such offenses, and secures to him the right of a trial within the same limits." Pages 596, 597.

That decision was based upon the theory that the offense, in any view of the facts, was committed within the district which included the county, and, for the purposes of such jurisdiction, extended 100 rods beyond its boundary line; and that the mere fact that such district included territory over which there was jurisdiction in common with another district did not make it repugnant to the constitutional clause in question. The doubt expressed by Chief Justice RYAN [in *In re Eldred*, 46 Wis. 548] as to "whether the legislature could appoint a district greater or less than the county for trial of a crime complete within a county" is inconsistent with what he said in the same opinion, and is without foundation, and contrary to a recent decision of this court. *Shaffel v. State*, 97 Wis. 377, 380, 381. This is made plain by what is there said by Mr. Justice WINSLOW, as follows:

"If there may be a district with different boundaries from those of a county, why may not such district be smaller than a county, as well as larger? We see no good reason. Certainly, it must be either larger or smaller, if the word is to have any meaning. And we know of no facts, either in the history of the state or of the formation of the constitution, which would justify us in holding that the word 'district,' as here used, must mean a district larger than a county, and nothing else. We give the word its natural meaning, and, so doing, we hold that a judicial district may be created smaller than a county, and that a jury summoned from such district satisfies the constitutional guaranty." *Pooler v. State*, 97 Wis. 630.

Counsel cite three cases from Missouri which are claimed to hold a different doctrine, but none of them was based upon a constitutional provision like ours. On the contrary, they were all based upon the constitution of that state adopted in 1875, where the language was "impartial jury of the county." Sec. 22, art. II, Const. Mo. The language of the prior constitution of that state was "impartial jury of the vicinage." So the case cited from Arkansas was based upon the constitution of that state adopted in 1874, where the language was "impartial jury of the county," with a provision for changing the venue. Sec. 10, art. II, Const. Ark. So the case cited from West Virginia was based upon the constitution of that state adopted in 1872, where the language was "in the county where the alleged offense was committed," unless the venue should be changed. Sec. 14, art. III, Const. W. Va. As pointed out in *State ex rel. Brown v. Stewart*, 60 Wis. 597, in the Tennessee case cited by counsel the words "or district" were treated as a mere superfluity. The same is true of the Illinois case now cited by counsel.

Would this court be justified in thus eliminating the words "or district" from the provision of the constitution in question? If they were not intended to have any meaning, then we perceive no reason for using them in connection with the word "county." As indicated by Mr. Justice PAINE in the case cited, the provision of the constitution in question was taken from article VI of the amendments to the constitution of the United States, substituting the word "county" for "state," and the word "or" for "and," so that it reads "county *or* district" instead of "state and district," and substituting for the words "which district shall have been previously ascertained by law" the words "which county or district shall have been previously ascertained by law." The obvious reason why the conjunctive was used is that in some of the states there were two judi-

cial districts then created and organized, and so it was designed to give to the accused the right of trial by jury in the district as well as in the state. And yet it has been held by the supreme court of the United States that the district court of the United States for the Eastern district of Michigan had, under the statute of the United States, jurisdiction "to try a person for an assault with a dangerous weapon committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit river, out of the jurisdiction of any particular state, and within the territorial limits of the dominion of Canada." *U. S. v. Rodgers*, 150 U. S. 249. Of course, in that case the offense was not committed in any other state or judicial district. Such change of phraseology in our state constitution was obviously made with deliberation and for the purpose of leaving the legislature untrammeled in the matter of forming judicial districts. It would in most cases be very difficult to convict persons guilty of offenses on the waters of Green Bay, or the other waters mentioned, if the state were required to allege and prove the particular county in which the offenses were committed.

We must hold that the counties on the shores of Green Bay "have jurisdiction in common of all offenses committed on that part of said Green Bay which lies within the limits of this state." Sec. 8, Stats. 1898. In other words, each of such counties, together with that portion of Green Bay, constitutes a judicial district, within the meaning of the constitution. *Id.* True, the word "jurisdiction" may have been inaptly applied to counties in that section; but, when we consider the whole section, it is obvious that the "jurisdiction in common" refers to the jurisdiction of the courts in the respective counties. Sec. 8, R. S. 1878, and sec. 8, Stats. 1898. We must hold that section to be constitutional and valid. It follows that the first question certified must be answered in the affirmative.

The *second* question certified is this: "Was the defendant, at the time of the commission of the alleged offense, an agent of the superintendent of fisheries, authorized in writing, within the meaning of sec. 15, ch. 311, Laws of 1899?"

The *third* question certified is as follows: "Was the defendant, at the time of the commission of the alleged offense, in the presence of the superintendent of fisheries or his agent authorized in writing, within the meaning of sec. 15, ch. 311, Laws of 1899?" That section provides:

"The commissioners of fisheries, or other persons authorized by law to propagate fish, shall have the power and are authorized to take fish at all seasons of the year from the outlying waters of the state for stocking other waters or for the purpose of securing eggs for artificial propagation; and shall dispose of said fish in such manner as they deem to be to the best interest of the state: provided, however, that no such fish shall be taken except in the presence of the superintendent of fisheries or his agent authorized in writing."

The waters of Green Bay are declared by statute "to be outlying waters," and hence come within the provisions of the section quoted. The substance of the contracts between Kalmbach and the commissioners of fisheries and James Nevin, the superintendent of fisheries, is given in the statement of facts. Under those contracts the three tugs mentioned as being furnished by Kalmbach, the sailboats, nets, and outfits, and men to run the boats and operate the nets, were so furnished for the use of the commissioners, and with them enough fish were to be caught, under the direction of the superintendent and his agents, for securing the amount of spawn required. Such contracts of themselves would seem to be sufficient authority in writing to Kalmbach to so furnish the tugs, sailboats, nets, outfits, and men for such use of the commissioners. Under such circumstances the superintendent of fisheries, eleven days prior to the commission of the alleged offense, gave written permission and authority to Kalmbach to allow the McDonald Bros., including the defendant, "with the fish tug Fish

Hawk, to set nets to catch white fish to get spawn *on the same conditions that his tugs* [named in the contracts] are allowed to fish." This written permit, with the concurrence of McDonald Bros., placed the fish tug Fish Hawk and its outfit as effectually in the service and use of the commissioners of fisheries as either of the three tugs mentioned in their contracts with Kalmbach. Such written authority was to McDonald Bros., with their "fish tug Fish Hawk to set nets to catch white fish," etc., whenever allowed to do so by Kalmbach. In fact, such written authority was to both McDonald Bros. and Kalmbach. Since such written permit gave such authority, and was actually delivered by the superintendent of fisheries, it is not conceived to be material whether it was in the actual possession of McDonald Bros. or Kalmbach.

It appears that after the delivery of such permit to Kalmbach, and pursuant to his instructions, McDonald Bros., in pursuance of such permit, engaged in taking fish from the waters of Green Bay with the fish tug Fish Hawk for the purpose of obtaining fish spawn for such commissioners, and that as often as the boat landed at Detroit Harbor, the point from which the boat went out for fish, and to which it returned with fish, such fish and spawn were turned over to such superintendent or his agent, Frank Suthers, then in the employ of such commissioners, and the same were then weighed by Nevin or Suthers, and delivered to Kalmbach, from whom McDonald Bros. received pay for all fish so caught; that upon the day of the alleged offense the firm of McDonald Bros., composed of the defendant and his copartner, together with the crew of the Fish Hawk, were fishing with nets for white fish in the waters of Green Bay at the place described, and the crew caught both trout and white fish, but took no spawn; that on that day Nevin was at Green Bay and Suthers at Sturgeon Bay, neither being at Detroit Harbor nor on the fishing tug Fish Hawk; that at

the time of the commission of the alleged offense the "defendant was in all things complying with the conditions and requirements of the contracts" mentioned between such commissioners and Kalmbach. It follows from what has been said that the second and third questions certified must each be answered in the affirmative.

The *fifth* question certified has, in effect, been answered by what has already been said, and hence requires no specific answer. By the *fourth* and *sixth* questions certified we are asked to determine whether the trial court committed an error on the trial by refusing to allow the defendant's counsel to address the jury, and also by charging the jury that they must find the defendant guilty. It is claimed on the part of the state that such questions can only be properly determined when embodied in a bill of exceptions and brought here by writ of error. Without determining that question, we have concluded not to answer either of those questions, as neither is essential to the determination of the case.

By the Court.—The first, second, and third questions certified are each answered in the affirmative, and the others are left unanswered.

PORTAGE COUNTY, Appellant, vs. THE TOWN OF NESHKORO, Respondent.

February 26 — March 19, 1901.

Paupers: Relief of nonresidents: Reimbursement: Ultimate liability: Statutes: Construction: Amendment.

Ch. 216, Laws of 1895 ("an act to simplify the method of giving aid to paupers and the method of collecting the same in certain cases"), did not relieve the municipality in which a pauper had a legal settlement from ultimate liability for aid given him by another municipality in any case where the former would have been ulti-

mately liable under the previously existing statute, but merely changed in certain cases the remedy of a municipality furnishing aid, so that in all cases it might obtain reimbursement from the county in which it was located, and such county might in turn obtain reimbursement from the municipality in which the pauper had his settlement, if any.

APPEAL from a judgment of the circuit court for Marquette county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action to recover for supporting John and Annie Bahn, paupers, who had a legal settlement in defendant town, but went therefrom to the town of Almond, in plaintiff county, in October, 1896, and within a few days thereafter required relief there at public expense, and received it. Within the time required by sec. 1512, Stats. 1898, the town of Almond complied with the conditions of such section as to rendering plaintiff liable to reimburse it for the expenses thus incurred, if the case was one covered by such section. The county did not take charge of the paupers, by reason whereof the town of Almond was compelled to continue to support them for the length of time covered by the claim in suit. The expenses thereof were, in due time, audited by the plaintiff pursuant to sec. 1512, and paid. This action was brought to obtain reimbursement for the county, from defendant, as the town in which the paupers had a legal settlement. The court dismissed the action because the relief was of an emergency character and not within sec. 1512, and because, in a case like this, there is no legal liability of the town in which the pauper has a legal settlement to reimburse a county that shall have paid for the support of such pauper while a public charge in some other town.

W. F. Owen, for the appellant.

For the respondent the cause was submitted on the brief of *John J. Wood, Jr.*, attorney, and *J. H. Rogers*, of counsel.

MARSHALL, J. As shown in *Milwaukee Co. v. Sheboygan*, 94 Wis. 58, from territorial days it has been the policy of

our laws that all poor persons, commonly known as paupers, and all helpless persons away from home in a place where they are neither residents nor have a legal settlement though not strictly paupers, standing in need of relief, shall have it at public expense. We took such system indirectly from Massachusetts, where it was adopted as early as 1793. Up to 1895 at least, the system treated persons entitled to relief as of four classes: (1) Every person in need of relief as a pauper in the particular locality where he had a legal settlement; (2) every person not a resident nor having a legal settlement therein, taken sick, lame, or becoming otherwise disabled, in any town, city, or village, and not having money or property to pay his board, attendance, and medical aid; (3) every person becoming a public charge for support in any town, having no legal settlement therein, but having such a settlement in this state; (4) persons requiring public support as paupers in this state and not having a legal settlement therein. The duty of relieving every person of the first class was imposed absolutely upon the town in which he had his legal settlement; that of relieving every one of the second class was imposed primarily on the town where the necessity therefor occurred, with the right of reimbursement from the county in which the town was located, and right of the county to be in turn reimbursed by the town in which the assisted person had a legal settlement. The primary duty to relieve every person of the third class was imposed on the town where such person should become a public charge, but with the right, upon compliance with certain specified conditions, to reimbursement by the town where the assisted person had a legal settlement. The duty to relieve every person of the fourth class was imposed on the county where the need thereof should occur. The first was covered by sec. 1499, the second by sec. 1512, the third by secs. 1513 and 1514, and the fourth by sec. 1517, R. S. 1878.

It will be seen that the ultimate liability for relieving every person entitled thereto at public expense, under the statutes of 1878, rested on the particular political subdivision of the state where such person had a legal settlement, if he had one in this state. It is now claimed that such system was changed by ch. 216, Laws of 1895, so that there is now no liability on the part of a town in which a poor person has a legal settlement to pay the expenses necessarily incurred for his support in another town. That would be an unreasonable and radical change. It would be such a departure from the old system, that existed from the foundation of the territorial government to 1895, and for half a century before that in the state from which we took it by adoption, that unless the language of the act in question clearly indicates such a change it cannot be held by judicial construction to have been accomplished, if a reasonable meaning can be given to such act.

The following are the changes effected in the statutes of 1878: There the language as to the persons entitled to relief under sec. 1512 was this:

"Any person not a resident, nor having a legal settlement therein, who shall be taken sick, lame, or otherwise disabled, in any town, and shall not have money or property to pay his board, attendance and medical aid."

The words "not a resident" were stricken out; the word "not" was substituted for the word "nor;" the words "city or village, or for any other cause shall be in need of relief as a poor person" were added after the word "town;" and the words "and maintenance" were inserted after the word "board;" so that the revised section, as regards persons entitled to relief, was made to read as follows:

"Any person *not* having a legal settlement therein, who shall be taken sick, lame or otherwise disabled, in any town, city or village, *or for any other cause shall be in need of relief as a poor person*, and shall not have money or property to pay his board *and maintenance*, attendance and medical aid."

There was also added to the section a provision giving to the municipality upon which the duty of furnishing relief is imposed, the right in all cases to be reimbursed by the county in which it is located, upon giving notice as therein indicated. That provision is as follows:

"It shall in all such cases be the duty of the town, city or village authorities within ten days after such person so becomes a public charge in their town, city or village to notify the county clerk of such fact, and thereupon the county authorities may take charge of such poor person and remove him to the county poor farm or relieve him in such other manner as they may see fit."

Secs. 1513 and 1514 of the old statute, which related to persons of the third class mentioned, were repealed; and the language of sec. 1517 as to persons relievable under it, which theretofore read, "All poor persons in their county, who have no legal settlement *in any town in this state*," was changed by substituting for the words "*any town in this state*" the words "*the town, city or village where they may be, except as provided in section 1512.*"

The legislative purpose of such changes was clearly indicated in the title to the act making them. It reads as follows: "An act to *simplify* the *method* of giving aid to paupers and the *method* of collecting the same *in certain cases.*" There is nothing in that pointing to a purpose to change the location of the burden of relieving persons entitled to relief at public expense. It indicates only a simplification of the method of performing an existing public duty and of imposing the cost thereof upon the locality liable therefor. The relief under sec. 1512, theretofore confined to mere transient persons in need of relief by reason of some sudden disablement in a town where they had neither a legal settlement nor a residence, and without money or property to pay their board, attendance, or medical aid, regardless of whether or not they were paupers strictly so called, was broadened out by omitting the words "not a resident," so

that the only essential, independent of the circumstance of inability to personally provide for the immediate necessity caused by the disablement accompanied with want of money or property at hand, is that of the sufferer having no legal settlement in the territory where relief is needed. To the restrictive words, "any person taken sick, lame, or otherwise disabled," there were added the words, "*any person who from any cause shall be in need of relief as a poor person.*" Those words, in their literal sense, include the persons mentioned in sec. 1513, which was repealed. The manner of the relieving town obtaining reimbursement for its expenses being changed by the addition to sec. 1512, giving it the right to reimbursement by the county in all cases, both secs. 1513 and 1514 became useless, and they were therefore repealed.

We can see no reason for saying that the change in sec. 1512, made by the addition of the words, "or for any other cause shall be in need of relief as a poor person," was intended merely to broaden out the circumstances under which mere transients were entitled to relief. That is contrary to the literal meaning of the words, and inconsistent with the declared purpose of the act and the omission from the revised section of the words "not a resident." Such omission was necessary to include the class of indigent persons formerly relievable under sec. 1513, as they are often residents of the town where they become a public charge. It was also necessary to add the words "maintenance" and the words "relieved as poor persons," because the class relievable under sec. 1513 were of the pauper class, strictly so called, and the relief required was *maintenance*, not merely such relief as sec. 1512 formerly contemplated.

The several changes in sec. 1512, it has been seen, preserved all of its existing features, added everything contained in sec. 1513 as to persons entitled to relief, and substituted for sec. 1514 a provision giving the relieving

town the right of reimbursement from the county. Thus the purpose of the act of 1895, indicated by its title, was effected. All nonresident persons entitled to be relieved by any town, city, or village are now in one class; the county in which such town, city, or village is located is made secondarily liable in all such cases, and the town, city, or village in which the assisted person has a legal settlement, if any, is ultimately liable the same as before, but instead of to the town, city, or village primarily liable in one class of cases, and to the municipality secondarily liable in the other, it is liable in all such cases to the county in which the municipality furnishing the relief is located. The town, city, or village primarily liable, but not necessarily ultimately liable in all cases, deals with the county of which it forms a part, and such county deals with the town upon which the ultimate burden is cast. If the section, as it now stands, had been properly punctuated by pointing off by commas the clause, "or for any other cause shall be in need of relief as a poor person," we apprehend that it never would have occurred to any one that such clause was used merely to add another circumstance entitling persons of the class already provided for in the section to relief, instead of to add another class of persons.

The change in sec. 1517 emphasizes what has been said as regards the legislative intent not to change the ultimate locality of the public burden as to the expense of relieving any class of persons entitled thereto. As before indicated, it formerly only required the county board to take charge of and relieve every person in the county in need thereof having no legal settlement in any town, city, or village in this state. The liability of the county having been created, by the changes in sec. 1512, to reimburse, in all cases, every town, city, or village for expenses incurred for the relief of any poor person not having any legal settlement therein, upon the minor municipality complying with its provisions

in regard to notice to the county clerk of the fact of such person becoming a charge upon such municipality, and privilege granted to the county, in harmony therewith, upon receiving such notice, to take charge of the indigent person and remove him to the poor house or otherwise provide for his needs as the proper county authorities might see fit, sec. 1517 was made to harmonize therewith by so changing its language as to place with the county board the care of all persons in the county needing public relief and having no legal settlement therein, except as provided in sec. 1512, regardless of whether they have a legal settlement in the state outside the county or not. We have now one system of caring for paupers having no legal settlement in the town, city, or village where support is needed, one source for such town, city, or village to look to for reimbursement, and one way of reaching the municipality ultimately liable. Whereas before there were four classes of persons, we may now treat all as three classes with regard merely to the manner in which the expense is to be primarily and ultimately borne. Formerly the municipality primarily liable was required to look for reimbursement in some cases to the county of which it formed a part, and in others to some other minor municipality which might be situated within the county or in some distant part of the state. Now, in all cases where reimbursement is due at all to the municipality primarily liable, it is from the county in which such municipality is located. Formerly a town might maintain a poor person having no legal settlement therein for an indefinite length of time without giving notice thereof to the municipality ultimately liable, and without such want of notice affecting such liability. Now, notice to the county of relief being given by a minor municipality to a person not having a legal settlement therein must be given within ten days of the time of such person becoming a public charge in order to preserve its right to reimbursement. Then, the county authorities only

had the right to take charge of poor persons having no legal settlement in any town in this state; now they have the care of every poor person relieved as such in any town in the county in which such person has no legal settlement, except as otherwise expressly provided in sec. 1512. That merely imposes upon the minor municipality the duty of preventing unnecessary suffering in the emergency cases mentioned, and in all cases of persons becoming a public charge therein, and of continuing relief so long as necessary unless displaced by the county authorities under sec. 1517.

In the case before us the persons relieved were in need thereof as paupers, within the plain meaning of sec. 1512, and the appellant county, according to law, became liable to the town which furnished such relief; and having discharged such liability, it became entitled to reimbursement from the respondent, the town in which the persons relieved had a legal settlement.

The judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court.— So ordered.

MOORE, Respondent, vs. BLACKMAN, Appellant.

February 26 — March 19, 1901.

Limitation of actions: Open account: Independent transactions: Married women: Separate property: New promise: Account stated: Findings.

1. Defendant was a married woman living upon a farm of her own, operated for her by her husband, who supported the family. Prior to 1888 she purchased goods of plaintiff upon open account, which was never settled. In 1894 the husband purchased seed of plaintiff which he paid for in a few days, the seed, however, being charged to defendant and the amount paid credited upon the account as cash. During the interval the husband had purchased barbed

wire, giving therefor his notes, which were afterwards paid. Both the wire and the seed were used upon the farm. *Held*, that each of the later purchases was an independent transaction which could not be tacked to the old account so as to avoid the bar of the statute of limitations.

2. A finding that on a certain date more than six years after the last item in an open account the creditor delivered to the debtor a copy of the account, and she agreed to pay it, and did not object to any item thereof, does not show that the case was taken out of the operation of the statute of limitations, under the provision of sec. 4243, S. & B. Ann. Stats., that no acknowledgment or promise shall be sufficient for that purpose unless in writing, signed by the debtor.

APPEAL from a judgment of the circuit court for Sauk county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

This is an action to recover the balance due upon an account for merchandise sold defendant between December 21, 1885, and April 23, 1894. The answer sets up that the defendant was and is a married woman, that she has never been engaged in any separate business of her own, and that the articles set forth in the account were for the use of her husband and other members of her family, and were not necessary to the use and enjoyment of her separate estate. There was also an allegation of payment, and a plea of the statute of limitations. The case was tried by a referee, who made findings for plaintiff. Exceptions were duly filed, and the matter was brought before the court on motions to set aside and confirm such report. The court confirmed the referee's report, and ordered judgment for plaintiff. The defendant appeals from such judgment.

F. R. Bentley, for the appellant.

Herman Grotophorst, for the respondent, contended, *inter alia*, that the account left with defendant and kept by her without objection to any item thereof became an account stated, even if defendant did not promise to pay it; and therefore the statute of limitations is not in the case at all.

1 Am. & Eng. Ency. of Law (2d ed.), 448; *Engfer v. Roemer*, 71 Wis. 11; *Wiggins v. Burkham*, 10 Wall. 129; *Oil Co. v. Van Etten*, 107 U. S. 325; *Missouri Pacific R. Co. v. Palmer*, 55 Neb. 559; *Jugla v. Trouttet*, 120 N. Y. 21; *Knickerbocker v. Gould*, 115 N. Y. 533.

BARDEEN, J. For the purposes of this appeal, we shall assume that the account sued upon was one properly chargeable to the defendant, and that it was a mutual and open account current until the transactions in 1894 hereinafter to be mentioned. It commenced in 1885, and ran along from month to month until September 12, 1888. From that date until April 23, 1894, there were neither items of debit nor credit. In the meantime plaintiff sold out his store business, and set himself up as a dealer in grain, seeds, etc. On the date last mentioned, Mr. Blackman, defendant's husband, purchased of plaintiff a quantity of clover and timothy seed, amounting to $20.14, which was entered on this account as "cash." It appears that *Mrs. Blackman* had not been in the store since 1885; that she had never given any orders to plaintiff to sell goods to her husband or to any other person. Mr. Blackman testified that he purchased the seed in question, and gave a note for thirty days, and when he got his pension money, about three weeks afterwards, he took up the note. The plaintiff denied that any note was given, but admits that on May 21st, thereafter, Blackman paid him for the seed, and canceled that part of his claim. He also admits that after the close of the general account in 1888, and before the date of the said transaction in 1894, he sold Blackman fence wire, and took notes from him, which were afterwards paid. It appears that *Mrs. Blackman* owned the farm on which the parties lived, and that the farm was operated by Mr. Blackman, who supported the family. The theory of the referee seemed to be that, because the wire and seed purchased by Mr. Blackman were used on defendant's farm,

these transactions might be tacked to the original account, and thus avoid the bar of the statute of limitations. As regards the purchase of the wire, the plaintiff testified: "I had no charge against her. I knew there was no liability on her part." The evidence conclusively showed that the seed transaction was one by itself, wholly disconnected with the old account, and was between plaintiff and Mr. Blackman. It was virtually a cash transaction, and could not be tacked to the old account so as to rejuvenate it.

The plaintiff argues that the statute of limitations is not in the case, because the referee found that about July 1, 1897, plaintiff called upon defendant, delivered to her a copy of the account, and she agreed to pay it, and did not object to any item thereof. The only testimony in the record regarding this transaction that we are able to find is that of plaintiff, as follows: "I was at *Mrs. Blackman's* place some time in July, 1897, for a settlement. She did not give me any written statement or promise or acknowledgment at this time. I went there for it, but she did not give it to me." The defendant states specifically that she never promised to pay the account, but always refused to have anything to do with it. It being considered that the account sued upon outlawed six years from the date of the last item, the acknowledgment or promise to take the case out of the statute must be within the rules laid down by this court in *Pierce v. Seymour*, 52 Wis. 272, and the statute (sec. 4243, S. & B. Ann. Stats.). Neither the findings nor the evidence brings the case within these requirements.

By the Court.— The judgment is reversed, and the cause is remanded with directions to enter judgment for the defendant.

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THE ATTORNEY GENERAL EX REL. ASKEW, Appellant, vs. SMITH and others, Respondents.

February 27—March 19, 1901.

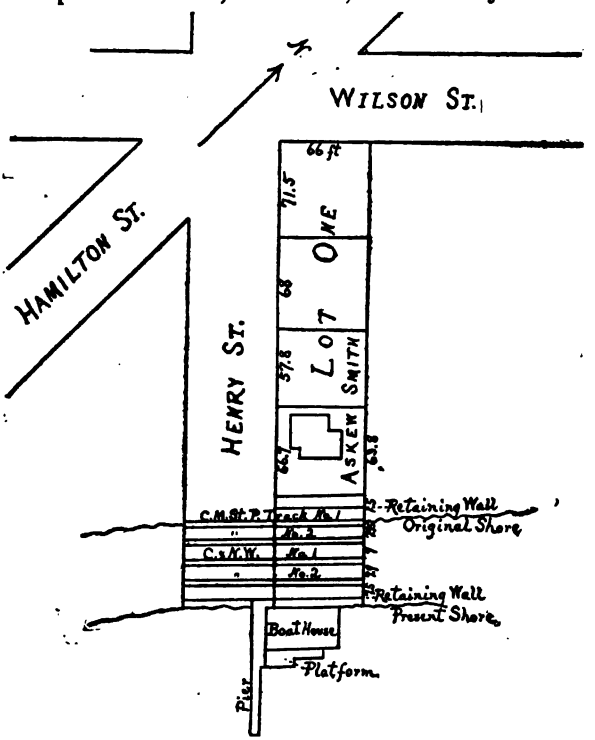
Waters: Lakes: Purpresture: Removal at suit of attorney general: Nuisance: Riparian rights: Railroads: Conveyance of land in fee: Ultra vires.

1. A structure built upon the bed of a lake, not in aid of navigation, such as a building in which to store and repair boats, is a purpresture.
2. A pier may lawfully be built by a riparian owner in aid of navigation, through shoal water to navigable water; but if built by one not a riparian owner it is a purpresture.
3. Where the owner of a lot bordering on a lake conveys the lake end thereof, including the shore, to a railway company in fee simple, he ceases to be a riparian owner. Even if the company has no power to acquire a fee in its right of way, but only an easement, yet the conveyance of the fee to it transfers the title and is valid until assailed in a direct proceeding by the government.
4. A mere purpresture is liable to abatement in a suit in equity by the attorney general, though it is not a public nuisance.
5. In an action to compel the removal of a boat house and pier in a lake, the attorney general filed a complaint which sought enforcement of the rights of the state and the private rights of the relator, an alleged riparian owner, as well. The proofs showed that the structures were purprestures though not a public nuisance, but showed that the relator was not a riparian owner and suffered no private injury. The attorney general did not appear in court on the trial, but made no attempt to withdraw the complaint or discontinue the action. *Held*, that judgment requiring the removal of the purprestures should have been rendered.

APPEAL from a judgment of the circuit court for Dane county: GEO. CLEMENTSON, Judge. *Reversed.*

This is an action in equity brought by the attorney general of the state, in his official capacity, upon the relation of a private citizen, to abate and remove certain structures erected in the waters of Lake Monona, at the foot of Henry street, in the city of Madison. The structures complained

of are alleged to be purprestures and public nuisances, as well as invasions of the riparian rights of the relator as owner of part of lot 1, block 70, in the city of Madison.



In the above map the premises occupied by the relator are four rods square, and marked "Askew." The relator claims, however, to own to the original shore of the lake, by reason of facts hereafter to be stated. Between the lines of her occupation and the shore of the lake as it existed prior to 1868 there was a distance of about fifteen feet, such shore being nearly at right angles with the lot lines. At some time prior to October, 1868, the Chicago, Milwaukee & St. Paul Railway Company built a railway track on said shore line, the center line of said track being practically on said original shore line. Said track is marked "C., M., St. P.

Track No. 1," on the map. Said company afterwards filled in dirt, and built another track, marked "No. 2" upon the map, and at a still later period made a contract with the Chicago & Northwestern Railway Company under which said last-named company was allowed to, and did, make a further filling, and constructed two tracks still further out in the original bed of the lake, which tracks are marked "C. & N. W. Tracks, Nos. 1 and 2," upon the map; and outside of the last track was constructed a retaining wall. The structures complained of in this action consist of a pier and a boat house for storage and repair of boats outside of this retaining wall, and standing in shallow water upon the bottom of the lake, and have been used by George W. Smith, the original defendant, and since his death by his heirs, the present defendants, for carrying on the business of a boat livery. Said structures stand in shallow water, from two feet to two feet and a half in depth.

The facts of the case were not greatly in dispute, and the court found the same, in substance, as follows:

Block 70 was platted by the proprietors of the land as a part of Madison in 1837, and lot 1 of said block (being the lot delineated upon the map) had a length of about 280 feet, extending from Wilson street, on the northwest, to Lake Monona, on the southeast. One Dean became the owner of said lot 1 in 1852, and prior to October, 1868, the Milwaukee & St. Paul Railway Company constructed a single-track railroad across the lot at its lake end; the center line thereof being the shore line of the lot. October 29, 1868, Dean and wife executed a deed in fee simple to said railroad company, conveying to it and its successors and assigns, forever, a piece of land from the lake end of said lot, described as follows: "A strip or piece of land forty-eight feet wide, extending across lot 1, block 70, in the city of Madison, through which strip or piece of land the line of the railroad of said company is now located, so as to leave fifteen feet in width on the inside (in shore) from the cen-

ter, and thirty-three feet in width of said strip on the outside of said center line (lake side)." This deed conveyed to the railway company fifteen feet of said lot next to the lake, and purported to convey thirty-three feet of the lake adjoining said fifteen-foot strip. Prior to 1883 the name of the Milwaukee & St. Paul Railway Company was changed to the Chicago, Milwaukee & St. Paul Railway Company; and since the time of the execution of the said deed from Dean said company has continuously occupied and used said land, from a certain retaining wall built by it about eight feet northwest of the center line of its track, for a roadbed, and has always occupied contiguous land made by filling in the bed of the lake.

On July 26, 1869, Dean and wife conveyed to one Nietert the following land: "Four rods square off from the southeast end of lot 1, block 70, city of Madison." October 23, 1873, Nietert and wife conveyed the same property to the relator by the same description. Nietert, after receiving his deed, went into possession of the piece of land four rods square adjoining on the northwest the strip of land deeded to the railway company, and marked "Askew" on the map, and built a dwelling thereon, which was his homestead, and has been the homestead of the relator since she purchased it; but neither Nietert nor the relator ever had possession of that part of lot 1 now occupied by the railway company.

On September 20, 1873, Dean and wife delivered to Bridget Minehan a deed of the following land: "All of the southeast one-half of lot 1, block 70, excepting forty-eight feet from the southeast end of said lot sold to the M. & St. P. R. R. Co., and another piece off the same end, four rods square, lying next to the railway track aforesaid, sold to Nietert." On the 18th of May, 1874, the administrator of the estate of Bridget Minehan, deceased, conveyed the last-named tract of land to George W. Smith, who went into possession thereof, built his homestead there, and occupied the same

until his death, in September, 1899, since which time it has been occupied by his widow. George W. Smith died intestate, and the present defendants are his heirs.

Shortly after Smith purchased said property he built a small pier in the lake at the edge of the railroad embankment as it then existed, and commenced the business of boat livery, which increased until it brought him an income of about $600 per year; and the present defendants have continued that business since his death, the boat house being enlarged as the business increased. Prior to 1883 the Chicago, Milwaukee & St. Paul Railway Company constructed a second track outside of its first track; and in 1883 the same company conveyed to the Chicago & Northwestern Railway Company the right to operate its then existing track along the shore of said lake, and construct another track on the lake side thereof, which said last-named company did in 1898, and extended its roadbed towards the lake by filling in the lake. During the year 1898 and since that time there have been four railroad tracks in operation; the three outside tracks at the place in question being over what was originally the bed of the lake; the width of the made land from the original shore line being fifty-one feet.

When the Chicago & Northwestern Railway Company was about to lay its second track, it was arranged between the said company and Smith that the company should move his boat house, platform, etc., out into the lake, outside of its retaining wall, which the company in fact did. Said boat house is now four feet from said retaining wall. The width of the boat house is eighteen feet, and its length sixty feet. On the lakeside is a platform for landing, and at Henry street is a pier extending sixty-eight feet into the lake, five feet in width for a part of the way, and three feet for the remainder. The boat house is used for storing boats and repairing them. The side of the boat house next the shore is supported by stones, and the other parts of the boat

house and the pier have piles driven into the ground. The water of the lake where the boat house stands is shallow, and only navigable by rowboats; the depth at the outer edge of the platform being two feet, and at the end of the pier, two feet six inches. Neither the boat house nor the pier or platform has obstructed navigation, nor have they inconvenienced the public in any way. The public have always used the pier, with the consent of the owners, without charge; hence the court found that said structures were not public nuisances.

From these facts the court concluded: That the title of Dean to lot 1 extended only to the edge of the water, the land under the water being the property of the state, held in trust for the public. The deed from Dean to the railway company vested in that company absolute title to the land described in the deed, except the part covered by the waters of the lake. The deed from Dean to Nietert conveyed the piece of land four rods square next to the piece sold to the railway company, marked "Askew" upon the map. Neither Nietert nor the relator ever had title to the shore of lot 1, and they never had any riparian rights, and as to the relator the defendant's structures are not a private nuisance. That the structures of the defendants constituted an unauthorized occupation of state land, but did not constitute a public nuisance, and it would serve no good purpose to the public, and would be a grievous injury to the defendants, to abate the same. That the attorney general, though a party to the action, has taken no part therein, and has not asked, on behalf of the state, that the court abate said structures, and has expressly declined to make such request, and the court therefore declines to render such judgment.

Upon these findings, judgment was rendered dismissing the complaint on the merits as to the relator, with costs, and as to the attorney general without prejudice and without costs, from which judgment the attorney general appeals.

For the appellant there was a brief signed by the *Attorney General* and by *Sanborn, Luse, Powell & Ellis*, attorneys for the relator, and oral argument by *A. L. Sanborn* and *F. C. Ellis*. They argued, among other things, that the boat house was a public nuisance and should be abated. *Larson v. Furlong*, 63 Wis. 323; *Hart v. Albany*, 9 Wend. 571; *Penniman v. N. Y. B. Co.* 13 How. Pr. 40; *Hecker v. N. Y B. D. Co.* 13 How. Pr. 549; *Moore v. Jackson*, 2 Abb. N. C. 211; *Enos v. Hamilton*, 27 Wis. 256; *People v. Cunningham*, 1 Denio, 524, 530; *Att'y Gen. v. Terry*, L. R. 9 Ch. App. 428; *Blanchard v. W. U. Tel. Co.* 60 N. Y. 514; *Knickerbocker I. Co. v. Shultz*, 116 N. Y. 382, 389; *People v. Vanderbilt*, 26 N. Y. 293; 1 Wood, Nuisances, 655, 656; *Ill. River P. Co. v. Peoria B. Asso.* 38 Ill. 467; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248, 262; *Atlee v. Packet Co.* 21 Wall. 389; *King v. Russell*, 6 East, 427; *King v. Cross*, 3 Campb. 224; *King v. Jones*, 3 Campb. 229; *Coburn v. Ames*, 52 Cal. 385; *Orton v. Harvey*, 23 Wis. 99; *Hundhausen v. Bond*, 36 Wis. 29; *Corning v. Lowerre*, 6 Johns. Ch. 439; *U. S. v. Brighton R. Co.* 25 Fed. Rep. 465; *Revell v. People*, 177 Ill. 468; *Gold v. Carter*, 9 Humph. 369; *Rex v. Ward*, 4 Adol. & El. 384; *People v. St. Louis*, 10 Ill. 351; *Cohn v. Wausau B. Co.* 47 Wis. 314; *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Priewe v. Wis. S. L. & I. Co.* 93 Wis. 534; *State v. Kean*, 48 L. R. A. 102; *Knowlton v. Williams*, 47 L. R. A. 314; *Comm. ex rel. Hensel v. Y. M. C. A.* 169 Pa. St. 24. The pier and platform are unauthorized and should be abated. *Larson v. Furlong*, 63 Wis. 323; *People v. Vanderbilt*, 26 N. Y. 287; *People v. New York & S. I. F. Co.* 68 N. Y. 71; *People v. New York & S. I. F. Co.* 7 Hun, 105, 109; *Rex v. Ward*, 4 Adol. & El. 384; *Ill. Cent. R. Co. v. Chicago*, 173 Ill. 471; *Ill. Cent. R. Co. v. Chicago*, 176 U. S. 646; *Matter of Staten Island R. T. Co.* 103 N. Y. 251; *Kerr v. West Shore R. Co.* 127 N. Y. 269; *State v. Carpenter*, 68 Wis. 165; *Att'y Gen. v. D. & B. B. R. Co.* 27 N. J. Eq. 1.

The action of the court does not depend upon the discretionary authority of the attorney general or any other officer. *State ex rel. Lamb v. Cunningham*, 83 Wis. 90; *Ex parte Parker*, 131 U. S. 221; *Central T. Co. v. St. L., A. & T. R. Co.* 40 Fed. Rep. 426; *Revell v. People*, 177 Ill. 468; Gould, Waters, § 168; *Jones v. Pettibone*, 2 Wis. 308; *Railroad Co. v. Schurmeir*, 7 Wall. 272, 286; *Ill. Cent. R. Co. v. Illinois*, 146 U. S. 387; *Barney v. Keokuk*, 94 U. S. 324, 333; *Wis. River I. Co. v. Lyons*, 30 Wis. 61, 64; *Wright v. Day*, 33 Wis. 260; *Norcross v. Griffiths*, 65 Wis. 599; *Willow River Club v. Wade*, 100 Wis. 86; *Kenyon v. Knipe*, 46 Fed. Rep. 309.

Rufus B. Smith, for the respondents, contended, *inter alia*, that the railway company being the riparian proprietor before the filling, it continued to be such proprietor after the filling, and the filling simply made a new shore line for its land. *Cleveland v. C., C., C. & St. L. R. Co.* 93 Fed. Rep. 113–137; *Hanford v. St. P. & D. R. Co.* 43 Minn. 104. The respondents have done what they have by the express license of the riparian proprietor, and have done nothing but what a riparian proprietor may do or may authorize another to do. *Delaplaine v. C. & N. W. R. Co.* 42 Wis. 214; *Diedrich v. N. W. U. R. Co.* 42 Wis. 248; *Delaware & H. C. Co. v. Lawrence*, 2 Hun, 163.

WINSLOW, J. Lake Monona is a meandered lake, navigable in fact. The title to its bed is in the state in trust for legitimate public uses, such as fishing, navigation, and the like; and the state cannot convey it away for private uses, nor can it abdicate the trust. *McLennan v. Prentice*, 85 Wis. 427; *Priewe v. Wis. State L. & I. Co.* 93 Wis. 534; *Mendota Club v. Anderson*, 101 Wis. 479; *Pewaukee v. Savoy*, 103 Wis. 271; Stats. 1898, sec. 1607*a*. A structure built upon the bed of the lake, not in aid of navigation (e. g. a building in which to store and repair boats), is a purpres-

ture,— an invasion both of the state's title and the rights of the public. A pier may lawfully be built by a riparian owner in aid of navigation, through shoal water to navigable water, if not prohibited by state law; but, if built by one not a riparian owner, it is an unauthorized structure, and an invasion of the rights of the state and the public, because the right to erect such a pier is simply an incident of riparian ownership. *Larson v. Furlong*, 63 Wis. 323; *Cohn v. Wausau B. Co.* 47 Wis. 314. Applying these legal principles to the facts as found by the trial court (which are amply supported by the evidence), it is entirely clear that the boat house was and is a purpresture, because it is not an aid to navigation, and that the pier is a purpresture, because those who built and maintain it are not riparian owners; and these were the conclusions reached by the trial court.

The trial court further held, however, that the relator was not a riparian owner; that the structures were not shown to be actually obstructions to navigation, or nuisances in fact, but, rather, conveniences to the public; and that the attorney general having taken no active part in the litigation, and declining to come into court and ask judgment of abatement on behalf of the state, the court, sitting as a court of equity, would not abate the structures.

With the first proposition, namely, that the relator is not a riparian owner, we entirely agree. The deed made by Dean to the railway company in 1868 was a deed conveying in fee simple the southeast end of the lot, and covered the shore line; the railway company had power by its articles of association, "to acquire, use, and sell, bargain, lease, and convey, all kinds of property, real and personal, necessary or convenient to operate, use, or maintain its railroad." But the appellant's contention is that the railway company could only acquire an easement or limited fee in lands to be used for right-of-way purposes, and that hence, notwithstanding the language of the deed, it must be construed as simply

conveying such easement, and that the relator, having by subsequent deed acquired the southeast end of the lot, owns the shore and all riparian rights, subject only to the easement of the railway company. *New York Central & H. R. R. Co. v. Aldridge*, 135 N. Y. 83; *S. C.* 17 L. R. A. 516. It was held by this court nearly twenty years ago, in the case of *Messer v. Oestreich*, 52 Wis. 684, that, when a railway company received a warranty deed of a strip of land for its track, the company did not take a mere easement, but a title in fee, subject at most to forfeiture for nonuser or misuser. If it be granted that the railway company had no power to acquire a fee in its right of way, but only an easement therein, still the making and delivering to it of a deed of the fee would transfer the title. The transaction would be *ultra vires*, but, upon principles now well established, it would be valid until assailed in a direct proceeding brought for that purpose by the government. Private persons could not attack it in collateral actions. *John V. Farwell Co. v. Wolf*, 96 Wis. 10. The relator is not, therefore, a riparian owner, and suffers no private injury.

Thus far we agree, in substance, with the conclusions reached below. The trial judge, however, concluded that navigation was in no way injured by the structures, and so, although they were purprestures, they were not public nuisances; that, the attorney general not appearing in court and asking abatement thereof on behalf of the state, a court of equity would not abate them. With this conclusion we cannot agree. It is true that a purpresture on the public land is not necessarily a public nuisance. Gould, Waters (2d ed.), § 21. A purpresture is a permanent invasion of the public land. A nuisance is an injury to the public rights of navigation, fishing, and the like. It is true that it has been held in California that a court of equity in this country has not the power to decree the abatement of a mere purpresture which is not a public nuisance. *People ex rel.*

Teschemacher v. Davidson, 30 Cal. 379. A different conclusion was, however, reached in *People v. Vanderbilt*, 26 N. Y. 287, where it was distinctly held that a mere purpresture is liable to abatement in an action in equity at the suit of the attorney general, irrespective of the question whether it is actually a nuisance, and that the offer to prove that a purpresture, such as a pier in navigable waters, was not in fact injurious to navigation, was properly overruled. Similar conclusions were reached in *Revell v. People*, 177 Ill. 468, and *U. S. v. Brighton R. Co.* 25 Fed. Rep. 465. The authorities cited in those cases entirely justify the decisions, and we have no hesitation in adopting the latter rule.

The complaint before us was framed in the double aspect of a complaint to enforce the rights of the state and the private rights of an alleged riparian owner as well, but the proof showed that there were no riparian rights in the relator. The case of the state, however, remained fully proven and unaffected by the failure of the private claim. Thus it stood when judgment was rendered: A complaint charging a purpresture on the lands of the state, and demanding its removal, filed by the proper officer. The proof showing all the facts essential to a judgment as prayed in the complaint. The attorney general had not withdrawn, nor attempted to withdraw, the complaint, or discontinue the action. We cannot but think that, under the circumstances, it was the duty of the court to render judgment of abatement. What might have been the duty of the court had the attorney general applied for leave to discontinue as to the public right, we need not consider, for there was no such application. Judgment of abatement of the illegal structures, as invasions of the public domain, should have been rendered.

By the Court.— Judgment reversed, and action remanded with directions to render judgment for the plaintiff as prayed in the complaint.

TRAPP, Respondent, vs. THE NEW BIRDSALL COMPANY, Appellant.

109 543
116 135

February 27—March 19, 1901.

(1) *Special verdict: Undisputed facts.* (3, 4) Res adjudicata: *Several grounds of decision.* (2, 5, 6) *Sales: Breach of warranty: Notice: Waiver: Evidence.*

1. Where an essential fact is established by the undisputed evidence, a failure to include a finding in respect thereto in the special verdict is not prejudicial error.
2. A contract of sale of a traction engine provided that the vendee should give written notice of any failure of the machine to satisfy the warranty, to the vendor and also to the agent from whom it was received; that notice to either alone should not be sufficient; and that no agent should have power to waive any of the conditions of the contract. In an action by the vendee for breach of warranty, a failure to show that such notice was given to the agent from whom the machine was received is *held* fatal to a recovery, although the notice was given to an agent higher in authority and to the vendor.
3. Where the notice given in such a case was, on a former appeal, held insufficient as a matter of law, that decision was binding upon a second trial, the evidence being the same.
4. Every point in or assumed to be in a case, and considered and decided as a basis for the final conclusion reached, is as much *res adjudicata* as if it were the sole point in controversy and the only one upon which judgment could rest.
5. If the vendor of a machine acts in respect to remedying defects therein without the notice which the contract of sale calls for, such conduct waives the giving of any notice other than that upon which it is based; but the mere fact that an agent of the vendor visited the machine and attempted to make it work properly, after an insufficient notice had been given, without proof that he was sent by the vendor or that the vendor had knowledge of his conduct, does not show a waiver of the required notice, especially where the contract provides that no agent shall have power to waive any of its provisions.
6. In an action for breach of warranty that a traction engine sold to plaintiff was "capable of doing as much and as well as other machines of like size and proportions," the admission of evidence and

submission of the case to the jury on the theory that the warranty covered a fault in the size of the boiler, in that it was not large enough to enable the machine to develop as much power as other machines of the same nominal horse power, was error.

APPEAL from a judgment of the circuit court for Columbia county: R. G. SIEBECKER, Circuit Judge. *Reversed.*

Action for damages for breach of warranty of a traction engine manufactured and sold by defendant to plaintiff. The contract between the parties contained this provision:

"The purchaser agrees to carefully follow any directions given him by the *New Birdsall Co.*, in starting and operating the machinery, and after giving it a fair trial of one week, and it should not work well, to give written notice to the *New Birdsall Co.*, at Auburn, New York, stating wherein it fails, and also to give like notice to the agent from whom it was received. It is agreed that notice shall be given both to the company and the agent, and notice to either alone should not be sufficient. Reasonable time is to be allowed to get to it and to remedy the defects if any exist, the purchaser hereby agreeing to render necessary and friendly assistance. If it cannot be made to perform as guaranteed, it shall be returned to the place where received, and a new machine given in its place or the notes and money refunded. . . . It is expressly understood that no agent has any power whatever to bind the *Birdsall Company* by any agreement preliminary to, collateral with, or additional to the contract herein set out, or to waive any of the conditions of this agreement."

The warranty contained in the contract to which the foregoing related, was as follows: "The machines are well built, of good materials, and, with proper management, are capable of doing as much and as well as other machines of like size and proportions." "No agent has any authority to change this warranty." The breach relied on was that the engine was not capable, with proper management, of doing as much and as well as others of like size and proportions. The complaint contained appropriate allegations to show performance of the conditions precedent, contained in the contract,

to the right to sue and recover on the warranty. The answer raised the issue of whether the engine was capable of doing the work guaranteed and whether notice of any deficiency in that regard was given to defendant and its agent as the contract required.

It was insisted on the trial that the sole test of whether the machine came up to the warranty was whether it was equal in working efficiency to other machines of similar size and proportions, and that the mere question of whether it was sufficient to do the work plaintiff subjected it to or that which he had in view in buying it, or whether it would develop any particular number of horse power, was immaterial. The trial was conducted on that theory at times, and at others evidence was allowed, over objection by defendant's counsel, as to the working power of engines unlike the one in question in size and proportions; and other evidence was allowed on the theory that the test, under the warranty, related to power, regardless of the restrictive words of the warranty, "similar size and proportions," and remarks were made by the court along those lines.

The evidence on the subject of notice was in substance as follows: Plaintiff testified that he notified the agent at Fond du Lac and the defendant that the machine would not "do the work"; that a Mr. Sample wrote two letters for him, one of which was addressed to Mr. Dallman, the agent at Fond du Lac, and one to the company at Auburn, New York; that the substance of them was that the engine would "not do the work," and that he would not pay for it and would not accept it. Mr. Sample corroborated *Mr. Trapp* as to writing two notices and addressing them, but could not say as to the contents. The evidence of plaintiff given on a former trial was produced and was as follows: 'I supposed two notices were written, one to Mr. Dallman at Fond du Lac and one to the *Birdsall Company*. The substance was I could not keep up steam. I do not know about

stating engine would not work as guaranteed. I know one notice was addressed to Dallman. I am not sure about the other. I cannot tell for certain whether there was one notice or two. I am not quite sure about that.'

The evidence on the other question litigated was in substance as follows:

Testimony of plaintiff: 'I bought the engine of Mr. John Prien, defendant's agent at Columbus, Wisconsin. I started it August 7, 1895. It did not work satisfactorily. In a few days I notified Mr. Prien. Abel was sent to examine it,—sent by Mr. Dallman, the agent at Fond du Lac, I suppose. I followed his directions in operating the machine, but it did not work any better. It worked hard every way. After sending the notice, Mr. Glassnap, an engineer from Fond du Lac, came and did some work on the engine, but did not materially improve it. He came a second time, according to a promise made by the Fond du Lac agent, but did not improve the machine. I delivered it back at Columbus, to the agent of whom I purchased it, and demanded back my notes. I operated an engine of the same make, rated at twelve horse power, three less than the one in question, having a boiler, however, of the same size, but a smaller fire box. It did the better work. The new machine did not run right, but I could not discover the cause.'

Evidence of John Prien: 'I sold the engine to plaintiff as agent for defendant at Columbus, Wisconsin. *Trapp* came to me with complaints soon after he started it. I do not remember of seeing any written notice from him. I sent an agent to fix the engine.'

Evidence of Henry Trapp: 'The engine did not seem to have strength enough. It worked when we had steam enough. If we had lots of steam it would work all right. Otherwise the motion would run down. The governor did not regulate it right. I have worked considerable around engines.'

Evidence of Thomas McBurnie: 'I worked around the engine. They could not keep up steam. I did not notice anything about it different from other machines. I thought it ran hard, that's all.'

Testimony of Horatio Smith: 'I went to *Mr. Trapp's* place to examine the engine. It was then carrying eighty pounds of steam. It was working hard, as if it had more load than it really could pull. They could not get the steam above eighty. I am familiar with the power required to operate a machine as they were operating at that time. It would take about ten horse power. (*Under objection:* I do not think the machine could do as much or as well as another engine of like size and proportions.) I refer to the Buffalo Pitts. I don't know the relative proportions of the two engines. (*Under objection:* I have seen a good many engines working. I made up my mind that *Trapp's* engine was not working right — working too hard. I have seen other engines run the same rigs and do it a good deal easier.) I don't think the engine was properly adjusted. It seemed to work too hard. The governor was not right. It is the duty of the engineer to take care of that. The trouble with the governor on the occasion in question was perhaps partly the fault of the machine and partly the fault of the engineer.'

Testimony of John Ashworth: 'I have had fifteen years' experience in operating threshing-machine engines, and saw the engine in question in operation and looked it over. It seemed to run awful hard. Something was not right or adjusted right. The governor did not appear to be working right. I held it to assist the working, but it did not make any difference. When I saw the machine working it was when *Trapp* started it up. They were not threshing, just trying the machinery. As a general thing in a new machine the governor does not have to be limbered up much. If the trouble was in the band wheel or the binding of the shaft in the boxes the engineer could have fixed it.'

Evidence of John Findlay: 'I have handled steam threshing machines for seventeen years. I have run *Trapp's* rig with a Nichols & Shephard engine, and with a Rumley engine rated at fifteen horse power, and I think *Trapp's* was. My own was the largest.'

Evidence of G. A. Batz: 'Have had seventeen years' experience operating steam threshing machines. Am acquainted with the Birdsall engine in dispute, and have seen it in operation hulling clover with a clover huller. It required a hundred pounds of steam to operate the huller. It took two men to turn the fly wheel in putting on the belt, It bound somewhere. The hand of one man ought to have been sufficient. I have used twelve different engines and been with nine of them myself. Among them was the Stevens engine and the Pitts. They were about the same size as the one in question. There was also the Gaar-Scott, which was about the same size. I never measured them. I am only guessing. I think the Gaar-Scott was a little larger in the boiler. It was about the same size and proportions as *Trapp's* engine. Might have been a little larger but not much. It was able to develop about eight horse power, while *Trapp's* engine would develop but about seven, in my judgment, because they could not keep up steam. I know William Burlin's ten horse power Pitts engine and have seen it in operation. (*Under objection:* The engine in question would not develop as much power in operating a threshing machine as the Pitts engine owned by Burlin.) I have a Port Huron engine, now, rated at sixteen horse power. Before, I had a Pitts engine. It was larger than the Birdsall. What I said about the horse power of the engines is a guess. I don't think the ten horse power Pitts engine was much different in size from *Trapp's* engine, but I never made any measurements.'

Testimony of William Burlin: 'I own a Buffalo Pitts engine rated at ten horse power. Have had it eleven falls. Mr. Bradshaw has measured my engine. I was present.'

Testimony of James Bradshaw: "I am a mechanical engineer. Have had many years of experience. I have measured the engine in question, the so-called 'fifteen horse power Birdsall engine.' The engine will develop a trifle over twelve horse power. I have measured the Buffalo Pitts engine that has been spoken of. The two engines are the nearest in size of any I have compared the Birdsall with. The Birdsall will develop about one and nine-tenths horse power more than the Pitts. The latter is rated at ten horse power. The Birdsall engine has less square feet of heating surface and grate surface per rated horse power than any engine I have measured. (*Under objection:* In operating the Birdsall engine with another of like size and proportions, in my judgment as a mechanical engineer, it will not do as good work and as well as a machine of a different make.) The Birdsall engine has the smallest steam space of any engine I have measured. It prevents the engine from maintaining its steam.' *By the Court:* "And if it did generate the steam, would it have greater or less power?" *A.* 'It would have greater. That is the fault of the construction. The result is it is impossible to get steam in the boiler. You haven't sufficient steam space. The engine is all right but there isn't sufficient generating capacity for steam. The fault I find with the engine is in the steam surface and the grate surface,—lack of generating power in the boiler, lack of heating surface. There is not a fifteen horse power engine in the United States that has a boiler of that size, that I know of. I know engines rated at ten horse power that have larger boilers. The engine was a prettly fairly-constructed engine. I did not see anything the matter with the construction. The only reason I can assign for the band wheel being tight is that the engine is either out of line, the shaft is out of line, or screwed up too tight, or the piston ring is too tight. There is no doubt about the engine being large enough to develop fifteen horse power if the boiler were large enough.

Not a bit. If we had another engine built with a boiler of the same size as the Birdsall it would not develop any more power. No other engine built like this engine would develop any more power. The Buffalo Pitts engine has 12.6 feet of surface per rated horse power, while this engine has 9.9.' *Q.* "So that the two engines are not alike, of like size and proportions?" *A.* No. *The Court:* "He says that they are. He says that the difference lies in this: not in like size and proportions, but in the ratio of the capacity to generate steam per horse power. Is that the difference?" *The witness:* 'Any other boiler with the same amount of heating surface would develop the same power as the Birdsall. Your engine falls off in heating surface.'" *Q.* "Then the engines are not alike?" *The Court:* "Well, I must suggest that you must not confuse the jury by assuming that the simple fact of construction is the basis of this law-suit. It is the question of horse power, and that is the warranty. We must stay by the warranty." (*This remark of the court was objected to.*) *The Court:* 'What we want to know, Mr. Bradshaw, is, Does the engine in question have the same boiler capacity that others of like horse power have? *A.* No, sir, nor of smaller horse power. Any other engine with the same boiler would not develop any more power. An engine would develop more power with a balance valve, probably twenty per cent. more.'

Testimony of J. H. Algard: 'I have been in the business of operating engines, building and handling them, for twenty years. Am the owner of a Stevens traction engine. (*Under objection:* 9.9 feet of heating surface per horse power is not sufficient.) The Stevens engine has thirteen and a fraction feet of heating surface per horse power. (*Under objection:* My engine is capable of developing and maintaining more horse power than the Birdsall engine.)'

Evidence was given on the part of defendant to the effect that no notice of a breach of warranty was received from

plaintiff at Auburn, New York. On rebuttal there was evidence to the effect that from fifteen to sixteen horse power was required to run *Mr. Trapp's* threshing-machine rig.

At the close of the evidence defendant's counsel moved for the direction of a verdict, which was denied. The cause was submitted to the jury for a special verdict, which resulted in the following findings on the questions for consideration on the appeal: With proper management the engine in question was not capable of doing as much work and as well as other engines of like size and proportions. Fifteen horse power was required to run and operate plaintiff's threshing machine outfit. Plaintiff gave written notice to defendant at Auburn, New York, stating wherein the engine failed to do well.

Defendant moved to set aside the verdict and for a new trial, which motion was denied. Judgment was rendered in plaintiff's favor upon the verdict, from which this appeal was taken.

Maurice McKenna, for the appellant.

For the respondent there was a brief by *J. J. Sutton* and *Paul D. Durant*, and oral argument by *Mr. Durant.*

MARSHALL, J. Respondent's right to recover depended primarily on a solution in his favor of one or both of these questions: (1) Was the machine well built and of good material? (2) Was the machine capable, with proper management, of doing as much and as well as other machines of like size and proportions? Either or both of such questions being established for respondent, his right to recover turned on the solution in his favor of these further questions: (3) Was written notice given to agent Prien, from whom the machine was received, and to appellant at Auburn, New York, stating in what respect the machine failed to satisfy the guaranty? (4) Did appellant, after having reasonable

time therefor and the friendly aid secured by the contract, fail to make the machine satisfy the guaranty? (5) Was the machine returned to the place where it was received from appellant?

Appellant's first assignment of error is that the verdict does not cover all the questions mentioned. Complaint is made that there is no finding that the machine was returned to the place where it was received. It is deemed sufficient to say on this point that there was ample undisputed evidence to sustain it. Appellant's counsel admitted that the machine was received by respondent at his farm in the town of Hampden, Columbia county, Wisconsin, and proof was made that it was returned to such place after respondent claims that notice of the breach of warranty was given and the other circumstances occurred entitling him to rescind the contract of sale, and that appellant's agent, after such return, was notified thereof and that it was subject to appellant's control. So the failure to make a finding on that point is immaterial. It has often been said that where an essential fact is shown by the evidence to exist beyond reasonable controversy, a failure to include a finding in respect thereto in the special verdict, where one is taken, is not prejudicial error, if error at all. *Bell v. Shafer*, 58 Wis. 223; *Baxter v. C. & N. W. R. Co.* 104 Wis. 307, 313.

There is, however, an insuperable defect in the verdict, and in the evidence. The contract required, as a condition of a rescission of the sale, that written notice of any failure of the machine to satisfy the warranty should be given *to the agent from whom it was received* and to appellant at Auburn, New York, specifying wherein such failure consisted; that notice to one should not be deemed sufficient to satisfy such requirement, and that no agent should have the right to change the warranty, or bind appellant, by any stipulation not contained in the contract as signed, or to waive any of its conditions. There was no finding by the

jury that a notice in writing was given to the agent from whom the machine was received, nor was there evidence to that effect. There was an attempt to satisfy the requirement of the contract on that point by proof that a written notice was given to agent Dallman at Fond du Lac, Wisconsin. If that was sufficient, a finding of the jury was not necessary, as it was not seriously disputed but that such a notice was given. The difficulty is that the machine was not received from Dallman, but from agent Prien at Columbus. It seems that Dallman was somewhat higher in authority or of greater experience than Prien, or that there was some other cause that led respondent to deal with him as much or more than with Prien after the machine was purchased. Yet the evidence is undisputed that the purchase was made of Prien, that the machine was received through his agency, and that it was to him that written notice of breach of warranty should have been sent.

There is a further defect in the notice. The question in that regard seems to have been passed upon on the former appeal. *Trapp v. New Birdsall Co.* 99 Wis. 458. The contract required, as before indicated, that the notice should specify wherein the machine failed to satisfy the warranty. The evidence before was to the effect that the notice informed appellant that the "engine would not do the work," and that respondent would "not accept it or pay for it." On the last trial the evidence was the same. When the case was here before it seemed that saying "the machine will not do the work," coupled with the statement, "I will not accept it or pay for it," clearly did not satisfy the provisions of the contract. Therefore we decided that the notice was insufficient, saying that it manifestly did not inform appellant that the machine would not come up to the warranty, but did contain information that it would not successfully operate respondent's threshing-machine outfit. It was then thought, and the decision was in accordance therewith, that

when respondent said he would not keep the machine or pay for it, thereby foreclosing in advance any offer to remedy the difficulty complained of, the natural conclusion was that such difficulty was that the machine did not have sufficient capacity to operate respondent's threshing-machine outfit. That construction of the notice was in harmony with all the evidence in the case. The language of the notice, if ambiguous at all, was not so in its literal sense, in the light of the evidence. There was no case of ambiguity under circumstances warranting a resort to extrinsic evidence in arriving at the truth, from which evidence conflicting reasonable inferences might be drawn, making a jury question under rules governing the construction of the language of contracts. *Vilas v. Bundy*, 106 Wis. 168. The evidence being the same now, the former decision precludes a reconsideration of the matter. The court having once spoken, whether the decision was right or wrong, what was said must stand as the truth for the purposes of this case. The doctrine is familiar, and is unbending, that when a point is once decided in a case, and the time has passed for a review thereof, that decision must ever thereafter be received between the parties, on the question involved, as the truth. "*Judicia sunt tanquam juris dicta et pro veritate accipiuntur.*"

There is no escape, as it seems, from the foregoing conclusion. How the learned trial court came to overlook the fact that on the former appeal the notice was held insufficient as a matter of law and the rule that the decision thus made was binding on a second trial, the evidence being the same, is not perceived. Possibly it resulted from the fact that because, in an orderly consideration of the case here, after holding that the notice was insufficient, the contrary was assumed, hypothetically, as a basis for consideration of a further question, likewise held to call for a reversal of the judgment, it was supposed that the judgment finally turned

solely on the last point decided, and that the decision on that point only was to be considered *res adjudicata.* It is not infrequent that the rule is advanced that nothing is *res adjudicata* in a case except the particular point necessary to the decision. That is an extreme view of the doctrine of *res adjudicata.* It is resorted to sometimes by counsel to avoid the force of an adverse decision, and sometimes, seemingly, by courts as a justification for changing their position without distinctly overruling anything previously said. Such extreme doctrine has not found favor in this court. *Buchner v. C., M. & N. W. R. Co.* 60 Wis. 264; *Brown v. C. & N. W. R. Co.* 102 Wis. 137, 154; *Hart v. Moulton,* 104 Wis. 349. A study of those cases will show that every point in or assumed to be in a case, and considered and decided as a basis for the final conclusion reached, is as effectually decided as if it were the sole point in controversy and the only one upon which judgment could rest. If that were not the case, when, in the orderly consideration of assignments of error on appeal, either of several are held to support the final determination reached, it would be easy thereafter, in using the decision as authority, to so shift one's position — claiming at one time that a particular point was all that was necessary thereto, and that what was said on other points was *obiter*, and at other times that one of such other points was all that was necessary to the decision, and that what was said on others was entirely unnecessary and should be considered as *obiter* — as to render the decision useless for any other purpose than the particular relief granted in the case.

Respondent's counsel say that, admitting that notice was not given of the failure of the machine to satisfy the warranty, as required by the contract, that was waived by the fact that the notice which was given was recognized and acted upon, an agent of appellant having visited the machine and endeavored to make it perform as guaranteed. The doctrine is familiar that under such a contract as the one

here, if the seller acts in respect to remedying defects in the machine, without the notice which the contract calls for, the omission to insist upon such notice effectually changes the contract so as to make it conform to the conduct of the parties; that such conduct waives the giving of any notice other than that upon which it is based. *Kingman & Co. v. Watson*, 97 Wis. 596; *Sandwich Mfg. Co. v. Feary*, 40 Neb. 226; *Davis' Sons v. Butrick*, 68 Iowa, 94; *Wendall v. Osborne & Co.* 63 Iowa, 99; *Mass. L. & T. Co. v. Welch*, 47 Minn. 183; *Sandwich Mfg. Co. v. Trindle*, 71 Iowa, 600. The difficulty in applying that doctrine to the evidence in this case is that there is no evidence that appellant acted on the defective notice if one was sent. There is evidence that one of appellant's agents visited the machine after the notice is claimed to have been given, but there is no evidence that he was sent by appellant or that appellant had knowledge of his conduct. The mere fact that the agent so acted did not bind appellant. The contract expressly provided that no agent should possess authority to add to it in any way or to waive any of its provisions. It follows, as contended by appellant's counsel in the court below, as appears by the record, and here also, that there was an entire failure of proof in respect to compliance with the contract on the subject of notice of the alleged insufficiency of the machine, and that there was no evidence to establish a waiver of the notice. Hence the case should have been taken from the jury as requested by appellant's counsel. *Nichols & S. Co. v. Chase*, 103 Wis. 570.

If we could have passed successfully the obstacles already referred to in the way of supporting the judgment, it would nevertheless have to be reversed because of errors committed on the trial, hereafter referred to.

It was plainly decided on the former appeal that the warranty was not that the machine would develop its rated or any particular amount of power, nor that it would operate

Mr. Trapp's threshing-machine outfit, but that it would do as much and as well as other machines of like size and proportions; not as much as any other machine in existence of the same size and proportions, as seems to have been understood on the second trial, but as other machines — machines generally — of like size and proportions. At the commencement of the trial the line laid down by this court for future guidance in the cause appears to have been fairly understood by the trial court, but the persistent efforts of respondent's counsel to place before the jury the fact that the machine would not successfully operate *Mr. Trapp's* threshing-machine outfit though its rating was equal to the task, and that other machines of a lower rating would do the work, seem to have finally led the court to fall into the same error as before, to a sufficient degree at least to confuse the jury and render it quite probable that the real question at issue was not passed upon by them.

There is no need to prolong this opinion by referring at length and in detail to the numerous questions that were allowed over objections made by appellant's counsel, and remarks made by the judge that were also duly objected to, showing want of comprehension of the real question for investigation, namely, Was the machine capable of doing as well and as much as other machines of the same size and proportions? The following are a few of the many instances that might be referred to.

Horatio Smith, an expert, was allowed to testify generally, that he did not think the engine in question would do as well as another machine of like size and proportions. On his cross-examination it appeared that the other machines that he had in mind in giving his testimony were dissimilar in size and proportions to the one in question, so far as he knew; that he had never measured any of them and that his evidence was merely guesswork; that so far as he had in mind any basis for his testimony, it was the rated horse

power of different machines. In no other respect were the machines mentioned and the one in question similar in size and proportions. Notwithstanding that situation, a motion to strike out the expert's testimony was denied.

After respondent's chief expert, Bradshaw, had declared over and over again that the engine in question developed all the power that could be expected of one with the same sized boiler and the same amount of heating surface, that it would develop as much as any other engine of the same construction, and that the difference between the power of the machine and others was accounted for by the fact that the former had a smaller boiler and less heating surface than the latter — that it and other machines mentioned were not of like size and proportions — and in the face of an emphatic declaration to that effect, the trial court broke in with the remark: "He says they are. He says that the difference lies in this, not in like size and proportion, but in the ratio of the capacity to generate steam per horse power," closing with the interrogatory to the witness, "Is that the difference?" to which the witness answered, "Yes, sir, the ratio per horse power." The court then, addressing appellant's counsel, said: "And he says the same thing is true between your engines rated twelve or fifteen." Witness Bradshaw had already testified to the simple fact, not requiring the knowledge of an expert to understand, that the power of an engine with its boiler depends on the steaming capacity of the latter and on the capacity of the former to convert steam pressure into motive power, and if the latter is rated at a sufficient amount to develop fifteen horse power, yet the boiler with its fire box is only equal in steaming capacity to ten horse power, that is the limit of the power of the machine. If the learned court did not have in mind the idea that a fifteen horse power engine, according to its rating, with only effective heating surface sufficient to generate steam to work the engine up to twelve horse power,

and an engine of the same rated horse power with a boiler having steaming capacity sufficient to work the engine up to nine horse power, were not dissimilar in size and proportions, he certainly conveyed that idea to the jury and led the witness to do the same, though the latter had repeatedly said before, and also said afterwards, that the undersized boiler in the machine in question was the cause of the small capacity thereof in comparison with its rated horse power.

After the occurrence above referred to, and upon the witness Bradshaw again testifying that the undersized boiler in the machine was what made it deficient in power, it being, as he said, smaller than in any other machine of a like-rated horse power that he had ever seen, appellant's counsel, to obtain a declaration from the witness in the nature of a necessary conclusion from what he had said, asked this question: "Then the two engines are not alike?" Without giving the witness time to answer, the court said: "Well, I must suggest that you must not confuse the jury by assuming that the simple fact of construction is the basis of this lawsuit. It is the question of horse power, and that is the warranty." At that point, evidently, the effect of the previous decision of this court had ceased to guide the trial. The idea was prominent that respondent purchased a machine guaranteed to develop a certain amount of horse power and was entitled to recover if the effective horse power was not as much in proportion to the rated horse power as other machines. Nothing had been said in the case, up to the time the remark quoted was made, about construction of engines, that did not bear on dissimilarity of size and proportions between the engine in question and other machines, so the jury must have understood by such remark that respondent was entitled to an engine capable of developing as much effective horse power per rating as other machines developed, regardless of physical size and proportions. Later, and immediately following the witness's explanation

that the capacity of a boiler and its connections in effective heating surface is vital as regards size and proportions of an engine, the court said to the witness: "What we want to know is, Do you find that this engine in question has the same boiler capacity that others of like size and proportions have?" to which the witness answered: "No, sir, no; nor one of smaller horse power." The witness having, as indicated, many times testified that the engine had as much boiler capacity per actual horse power as other engines, but that he had never seen one with such small boiler capacity with an engine so large, the only reasonable conclusion from the remark of the court is that the judge had in mind boiler capacity to rated horse power, and that he, in effect, told the jury that similarity of size and proportions, between the machine in question and others, depended on that, and the witness answered accordingly. There can be no mistake about that, as the witness later testified emphatically that no other machine of the same size and proportions in every respect would develop any more power.

The erroneous and prejudicial ideas thus placed before the jury for their guidance were emphasized and given all the significance possible without specific instructions from the bench, by inserting, as a part of the special verdict, this question: "How many horse power was required to run and operate plaintiff's Advance separator with his feeder, bagger, and blowstacker attachments?" The answer of the jury was, "Fifteen horse power."

By the foregoing brief review of errors committed in presenting the evidence to the jury, it is manifest that appellant has not had a fair trial. The case was tried on a false theory, substantially the same as before. If there is any difference between the two trials it is in the degree only in which the court departed from the true line. In the first instance a wrong theory was sustained from the beginning to the end; in the last, a right start was made, in accord-

ance with the decision of this court, but the end was substantially the same as before. True, the jury decided in form, in answer to one of the special questions, that the machine was not capable of doing as much and as well as other machines of like size and proportions, but it is probable, if not reasonably certain, that since it required fifteen horse power to operate *Mr. Trapp's* threshing-machine outfit, and the machine in question was purchased to do that work, and other machines of like-rated horse power or less were equal to the task but the former was not, the jury said it was not capable of doing as much and as well as other machines of like size and proportions within the meaning of the guaranty.

It is significant that counsel for respondent admit in the printed brief, as we understand it, the correctness of the foregoing. But they say that the construction of the contract of warranty contended for by appellant is unreasonable; that to hold that it means just what it says, i. e. that the machine is as good in working efficiency as other machines of the same size and proportions, is to give no effect to it for the purchaser's protection, therefore that some other construction should be adopted. To that there are several answers: First, the point was fully settled on the former trial and is not now open to change. It is respondent's misfortune that he secured a verdict by counsel's failure to regard the plain rule laid down for the second trial, and persistence in such failure till the trial court was swung away from the safe position first taken. Second, since the language of the guaranty is so plain that it does not admit of any other construction than that given to it, a resort cannot be had to judicial construction to turn a bad into a good contract. If parties, with their eyes open, will make unreasonable contracts, courts cannot save them from the consequences thereof. Third, the warranty, as it reads, evidently covers all that the seller was willing to guaranty.

It bound itself to make good any defect in material and workmanship, and any deficiency in working power as compared with machines made by others, of the same size and proportions. There was a careful avoidance of any stipulation that the machine would develop any particular amount of horse power. It contemplated that the seller should not be held responsible for any fault in respect to the mere size of the boiler, in that it was not large enough to supply sufficient steam to the engine to work it up to the power of other machines having a similar sized engine in rating. The guaranty was of the machine as it was, not as it would be with a larger boiler. There is nothing so very unreasonable about that, so long at least as there was no hidden meaning in the words used to express what was intended.

It seems that we make no mistake in saying that respondent's counsel admit that the case was tried and submitted to the jury on the theory that want of a boiler large enough to develop as much power as other fifteen horse power engines was covered by the warranty. They say appellant's counsel should not complain, since it was shown by unmistakable evidence that the defective proportions of the engine were what rendered it incapable to come up to other machines of like size and proportions. To make that sensible, we must conclude that "defective proportions" in counsel's statement, refers to the idea that the boiler was too small, and the heating surface of furnace and boiler too little, and that by the term "similar size and proportions" they refer to rated horse power, though it is difficult, it must be admitted, to get that sense out of the expression or determine just what counsel means. We are aided by a branch of their argument further along in the brief, under the heading, intended, as it appears, to give it particular significance: "Lack of horse power of the machine was caused by its undersized boiler." As it was distinctly said on the former

trial, and is now affirmed, that the warranty did not insure against an undersized boiler, counsel's argument amounts to an admission that the judgment is erroneous.

By the Court.— The judgment of the circuit court is reversed, and the cause remanded for a new trial.

CHARNLEY, Respondent, vs. THE SHAWANO WATER POWER & RIVER IMPROVEMENT COMPANY, Appellant.

February 27 — March 19, 1901.

109 563
53 LRA 892n
53 LRA 893n
s53 LRA 895

109 563
59 LRA 79n
59 LRA 842n
59 LRA 858n

Waters: Improvement of river for logging: Height of dam: Flowage of lands: Compensation: Necessity of taking: Prescriptive rights: Navigable rivers: Lawfulness of dam.

1. A corporation organized to build and maintain a dam across a river for hydraulic and manufacturing purposes and to improve the river and facilitate the running of logs therein, acquired a franchise, previously granted by the legislature, under which it had power to secure flowage rights under sec. 1777, R. S. 1878, as amended by ch. 318, Laws of 1882 (Stats. 1898, secs. 1777–1777*d*), and erected its dam pursuant to such franchise. In proceedings under said sec. 1777 to obtain compensation for the overflowing of lands by such dam, *held*, that the corporation cannot be heard to say, as a reason why commissioners of appraisal should not be appointed, that the dam was built higher than was absolutely necessary to accomplish the particular purposes mentioned in said section, i. e. the improvement of the stream and driving logs therein, and that the overflowing of the lands in question was not necessary for those purposes.
2. Although a dam across a navigable stream, constructed without authority from the state, may be a public nuisance, and the persons who have constructed it cannot, as against the public, acquire a prescriptive right to maintain it, yet if the dam overflows the lands of a private person its proprietors may acquire rights of flowage by prescription the same as though the dam had been authorized by the state.
3. A dam built and maintained, without legislative authority, by a riparian owner on a stream navigable only for the purpose of floating logs, is not unlawful if it does not materially affect or abridge the beneficial use of the stream.

APPEAL from an order of the circuit court for Shawano county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Proceedings to obtain damages to property claimed to have been overflowed by defendant's dam. By ch. 235, Laws of 1889, the privilege of erecting a dam across the Wolf river, near the city of Shawano, was granted to C. M. Upham and others for "manufacturing and other purposes." Said parties or their assigns were given power to secure flowage rights under sec. 1777, R. S. 1878, as amended by ch. 318, Laws of 1882. Defendant is a corporation organized for the purpose of building said dam for hydraulic and manufacturing purposes, and to improve the river and facilitate the running of logs therein, and is the assignee and owner of the rights and privileges granted to Upham and others under the act mentioned. The dam was erected in 1892, and by it the defendant maintains a head of water averaging about ten feet. Shawano creek, the outlet to Shawano Lake, empties into the Wolf river about a mile and one-half above the dam. This creek is navigable for logs and timber, and is thirty or forty feet wide. Some forty years or more ago a dam was built across this creek a little way above its mouth, in which a head of water from six to eight feet was claimed to have been maintained continuously and adversely until 1892, at which time defendant purchased the dam from one Kast, together with all flowage rights. Shawano creek is about four miles long, and is the only outlet of Shawano Lake, which is a body of water of considerable size. *W. H. Charnley* is the owner of lots 1 and 2, section 14, township 27, range 16 E., on the banks of this lake. In 1897, *Charnley* filed a petition for the appointment of commissioners, under sec. 1777 and acts amendatory thereof, to appraise the damages to his lands by reason of the overflow of the same by defendant's dam. The petition sets out the facts required by the statute, and claims injury to about twenty-

five acres of land, specifically described. An order for hearing was duly made.

Upon the return day the defendant denied that the lands described in the petition were necessary for the maintaining of said dam; denied that any portion of said lands were overflowed. It then alleged the construction and adverse maintenance of the Kast dam, a purchase of Kast's rights, and a prescriptive right to overflow all of the lands described in the petition. It also alleged that it does not now and has not for several years past improved the river for the purpose of driving logs, and that its dam is now wholly maintained for the purpose of furnishing power and operating mills and manufacturing plants located at or near said dam.

The testimony was taken, by stipulation, before a referee. Thereafter the court made findings, which are recited in the order appointing commissioners, among other things, to the effect that by the construction of its dam the defendant has overflowed said lands since about April 1, 1892, and that they were necessary for that purpose and the purposes of its incorporation; that it has no prescriptive right to overflow the same; and that the petitioner had suffered damages by reason thereof. This appeal is taken from said order.

For the appellant there were briefs by *M. J. Wallrich*, attorney, and *C. F. Dillett*, of counsel, and oral argument by *Mr. Dillett*. They contended, *inter alia*, that the statute (secs. 1777–1777*b*, Stats. 1898) restricts the power of overflowing and condemning lands to such lands as it is necessary to overflow in accomplishing some purpose therein enumerated. The uncontradicted evidence shows that it is unnecessary to overflow plaintiff's land for any such purpose. The case at bar not being within the statute, the petitioner cannot resort to the remedy therein provided, but must pursue his common-law remedies. *Moore v. Coburn*, 1

Pin. 538; Gould, Waters, §§ 583, 584; *Cogswell v. Essex Mill Corp.* 6 Pick. 94.

For the respondent there was a brief by *Eugene M. Wescott* and *George C. Dickinson*, and oral argument by *Mr. Wescott.*

BARDEEN, J. The points made by the defendant are (1) that the evidence does not show that the lands described in the petition are overflowed by defendant's dam; (2) that the evidence does not show that the overflow of said lands is necessary in accomplishing the purposes of its creation; (3) that the defendant has a prescriptive right to overflow said lands.

1. Concerning the contention that the evidence fails to show that the petitioner's lands are overflowed by backwater from the defendant's dam, there is considerable evidence in the record to support the trial court's conclusion. We may say that it is supported by a fair preponderance thereof. To discuss it would serve no useful purpose. We must therefore overrule the defendant's contention on this point.

2. The petition made a *prima facie* case for the appointment of commissioners, and it was for the company to show why they should not be appointed. *Gill v. M. & L. W. R. Co.* 76 Wis. 293. The defendant admits the purpose of its incorporation to be to build, maintain, and operate a dam across Wolf river under the franchise granted by ch. 235, Laws of 1889, for hydraulic and manufacturing purposes, for the improvement of said river, and the building and maintaining of piers to facilitate the running of logs therein. It accepted the franchise so granted, and erected its dam pursuant to the power thereby conferred. It must be presumed that it built its dam to such a head and of such dimensions as to properly carry out its corporate purposes, in absence of evidence to the contrary. Whatever may be the fact, when the company is called upon to pay compensation for

the land it takes by overflow, it cannot be heard to say that it has taken more than is absolutely necessary to carry out its purposes. So long as it maintains its dam under authority rightfully granted by the state, it will not be permitted to say that its dam is built somewhat higher than is absolutely necessary to carry out some of its corporate purposes. See *Babcock v. C. & N. W. R. Co.* 107 Wis. 280. By a fair construction of the act granting the franchise, the person whose lands are overflowed may, as was done in this case, institute proceedings to secure his damages, when the company fails to proceed. When this is done, as said in the case cited, "it would be incongruous to permit the latter to deny necessity of its taking, or to insist on allegation or proof by the other party, when the whole proceeding rests on its own acts, affirming such necessity in the most unambiguous terms."

The trial court found that the defendant had no prescriptive right to overflow these lands. Such finding is but a mere conclusion of law, and it is difficult to say whether it was based upon a consideration and determination of the fact from the testimony, or on an adoption of the rule of law contended for by the petitioner's counsel. Their argument is that Kast and his grantors maintained a dam across a navigable stream without authority from the state; that such dam was a public nuisance, and could never be legitimated by lapse of time, and therefore Kast had no rights he could assign. It must be conceded that Shawano creek is a navigable stream, within the rule established in this state. *Willow River Club v. Wade*, 100 Wis. 86, and cases cited. The dam was built on lands owned by the parties who maintained it. It had been built more than forty years prior to the time the defendant purchased Kast's interests, in 1892. The only evidence in the case regarding the right to maintain it was given by Mr. Kast when he said that he "maintained the dam publicly, claiming a right to do so without permission from any one."

Generally speaking, all hindrances or obstructions to the use of a navigable stream by the public, without authority from the state, are public nuisances. *Barnes v. Racine*, 4 Wis. 454; *State v. Carpenter*, 68 Wis. 165; *Knox v. Chaloner*, 42 Me. 150. See *In re Eldred*, 46 Wis. 530. "There is no such thing as a prescriptive right, or any other right, to maintain a public nuisance." *Douglass v. State*, 4 Wis. 387, and cases cited. This proposition, however, must be understood as applying to the rights of the public, and not to those of individuals, and it is the failure to appreciate this distinction that has led the counsel for petitioner into some confusion. A public nuisance cannot be abated by the act or at the suit of a private party unless it is shown that he has suffered some private and special injury. *Walker v. Shepardson*, 2 Wis. 384; *Greene v. Nunnemacher*, 36 Wis. 50; *State ex rel. Hartung v. Milwaukee*, 102 Wis. 509. This is based upon the principle that the rights of the state are to be vindicated only by public officers, but when the nuisance becomes a private one, so as to affect individual rights, the injured party may pursue his remedy. The fact, however, that a public nuisance cannot be legitimated as against the public, by the mere lapse of time, does not justify the conclusion argued for, that no prescriptive right can be obtained as against individuals. Important rights, as against individuals, may be acquired and lost by adverse enjoyment for a period of twenty years or more. As against the public, the Kast dam was wrongful if it obstructed the navigation of the stream. As against the petitioner, it was wrongful because it overflowed (if it did overflow) his lands and thus invaded his property interests. The private right of action arises, not from the fact that the dam was unauthorized, but because land was taken by the overflow without compensation. The right to damages would have been the same had the dam been authorized by state authority. That one may obtain a prescriptive right of flowage under proper

conditions cannot be disputed. It is a right which must have been claimed and maintained in hostility to the right of the person against whom it is set up. *Vliet v. Sherwood*, 35 Wis. 229. It must have been continuous, exclusive, known to, and acquiesced in by, the owner of the rights affected thereby. 1 Wood, Nuisances, §§ 418, 419, and cases cited. When these conditions concur, and the use has been extended for a period of twenty years or more, the prescriptive right becomes absolute. See Gould, Waters (3d ed.), ch. XI. Such questions are not to be determined by ascertaining how long the dam has been in existence, or by the claim the party makes during the period of prescription. The question is not how high the dam is, but whether the water has been held the requisite period so high as to affect the land flowed as injuriously as it does at the time the landowner seeks damages for such overflow. Gould, Waters, § 343.

While it has been the policy of this state to hold all streams capable of floating logs and timber to be navigable, yet in streams like this, that are not meandered, the landowner and the public have certain reciprocal rights, which may be enjoyed without the destruction of the other. This is fully set forth in the opinion of this court in the case of *A. C. Conn Co. v. Little Suamico L. Mfg. Co.* 74 Wis. 652, which holds distinctly that a dam built and maintained by a riparian owner, without legislative permission, in a stream navigable only for the floating of logs and timber, is not unlawful if it does not materially affect or abridge the beneficial use of the stream. See *Carlson v. St. Louis River D. & I. Co.* (Minn.), 41 L. R. A. 371, note. We fail to find anything in the evidence in the case at bar that brings it outside the line of the discussion and decision in the case last mentioned, nor are we able to perceive why a prescriptive right of overflow could not have been secured, if the facts exist that would bring the case within the principles of law stated.

Upon the question of fact of whether the Kast dam actually backed water upon the petitioner's land to the extent claimed, we have been obliged to refer to the record, and read over 350 pages of typewritten matter, in order to reach a conclusion. The failure to print any considerable portion of the testimony has greatly added to our labors. The burden of showing the nature and extent of the claimed overflow was upon the defendant. Gould, Waters, § 341. A careful review of the evidence convinces us that this obligation has not been met. On the contrary, we believe that a fair preponderance of the testimony shows that such overflow never reached the lands in question at a normal stage of water, as kept back by said dam. An attempt to justify this conclusion by reference to, and a discussion of, the testimony of the numerous witnesses would require much more time and space than the importance of the fact demands. We shall therefore content ourselves with the conclusion stated.

By the Court.— The order appealed from is affirmed.

REINDL and another, Respondents, vs. HEATH and another, Appellants.

February 27 — March 19, 1901.

Pleading: Joinder of causes of action: Contracts: Nature of lien action: Judgment.

1. A cause of action to recover for work done by plaintiffs under a contract with defendants for the sawing of logs, and to enforce a lien therefor upon lumber so sawed and still in the ownership of the defendants, is a cause of action upon contract, and, under sec. 2647, Stats. 1898, may be joined with a cause of action to recover for a breach of a provision in the same contract by which defendants agreed to furnish a certain quantity of logs to be sawed. Re-

marks in *Collins v. Cowan*, 52 Wis. 634, and *Shafer v. Hogue*, 70 Wis. 392, as to the nature of lien actions, limited, and the cases distinguished.

2. Judgment in plaintiffs' favor in such a case should provide for a recovery of the entire amount of the liability, and direct enforcement of the lien for such portion only as was properly lienable.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Appeal from order overruling a demurrer to the complaint for improper joinder of causes of action. The complaint set forth a contract whereby the plaintiffs agreed to manufacture "all the saw logs that may be purchased and delivered by the parties of the second part [the defendants] at the mill-yard of said first parties . . . during the winter of 1899 and 1900, which shall not be less than four million feet," at prices named. The first cause of action alleges performance of work in accordance with this contract to an amount in excess of payments of $1,204.89, prays recovery therefor, and that the same be adjudged a lien upon the lumber so sawed, now in the possession of the defendants. The second cause of action alleges failure by the defendants to furnish the full 4,000,000 feet of lumber, and that by reason of such failure plaintiffs suffered damage in idleness of mill, etc., in the sum of $6,000, recovery of which is prayed.

For the appellants the cause was submitted on the brief of *Quarles, Spence & Quarles.*

For the respondents there was a brief by *Bouck & Hilton*, and oral argument by *Gabe Bouck.*

DODGE, J. By express statute (sec. 2647, Stats. 1898) it is provided: "The plaintiff may unite in the same complaint several causes of action, whether they be such as were formerly denominated legal or equitable, or both, where they arise out of (1) the same transaction, or transactions con-

nected with the same subject of action; or (2) contract, express or implied."

It seems entirely obvious that the two causes of action against the defendants set forth in this complaint both arise out of contract; indeed, out of the same contract. The first is a cause of action to recover upon defendants' breach of the provision of that contract to pay certain money for services rendered. The second cause of action is to recover damages for the same defendants' breach of another provision of that contract to supply a certain quantity of timber to be sawed. Thus stated, there seems to be hardly room for argument, but the fact is pressed upon our attention that accompanying the allegation constituting the first cause of action are allegations of other facts sufficient to entitle the plaintiffs to a lien upon the lumber sawed and still in the ownership of the defendants, and a prayer for such relief, in compliance with sec. 3331, Stats. 1898. This, it is contended, transforms the first cause of action from one arising out of contract into something else, and this view is supported by a quotation from *Collins v. Cowan*, 52 Wis. 634, 637, where it is said: "The action to enforce the lien is *sui generis*. It bears some analogy to a libel *in rem* and proceedings thereon in admiralty." Also from *Shafer v. Hogue*, 70 Wis. 392, 395: "The [lien] proceeding under our statute serves a twofold purpose: *chiefly and primarily* to enforce a lien upon logs and timber for labor done upon them, and also to obtain a personal judgment for the amount due the plaintiff." Those remarks were addressed in both cases to the proceeding to enforce liens upon lumber, the property of a person other than the employer of the labor, and who, therefore, was not liable upon contract for the debt; and they are fully justified in that point of view. That distinction receives significance in *Munger v. Lenroot*, 32 Wis. 541, 545, where it is said: "So far as the general owner is concerned, if he does not himself employ the laborer, the proceeding is strictly *in rem*."

A suit against the employer which also seeks to enforce a lien upon lumber still in his ownership has a different aspect. There the recovery of the money which the defendant has contracted and failed to pay is obviously the chief and primary purpose of the suit, and the lien statute but serves to supply an additional remedy or means of enforcing the payment of such indebtedness when adjudged. The action against the employer to recover the contract debt is, of course, an action arising out of contract, and as to such defendant it is not transformed in its character by the annexation thereto of allegations and prayer for the ancillary remedy by way of lien. This was substantially decided in *Lackner v. Turnbull*, 7 Wis. 105, where it was held that a simple action for the recovery of money for work, labor, and materials was not changed in character by an amendment praying a mechanic's lien and alleging the additional facts necessary to support such demand. Had these plaintiffs originally sued for the two kinds of recovery now sought, without seeking a lien for the security of either, the contract character of the two causes of action would be too obvious for debate. But that situation, according to the case last cited, would not be changed by an amendment bringing in the application for a lien as an adjunct to one of the causes of action; nor is it changed by addition of such averments and prayer in an original complaint. In other words, misjoinder would not be and is not thereby brought about. The contract character of the first cause of action *quoad* the contract debtor himself is confirmed by several cases in this court holding that the action is one on contract and at law. *Marsh v. Fraser*, 27 Wis. 596; *De Morris v. Wilbur L. Co.* 98 Wis. 465.

No difficulty in formulating a proper judgment can arise from the joinder of these two causes of action. It is entirely competent for the court to adjudge a total money liability, and to adjudge and direct the enforcement of lien for only

a portion thereof against certain property. We hold, therefore, that the joinder of the two causes of action in the complaint before us is authorized upon the second ground stated in the statute above quoted. Such conclusion relieves us from consideration of the arguments on both sides as to whether it is also authorized upon the first ground.

By the Court.— The order overruling the demurrer is affirmed.

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McCann, Appellant, vs. Ullman and others, Respondents.

February 27 — March 19, 1901.

Sale of horses: Warranty of soundness: Breach: Undeveloped disease: Expert testimony: Veterinary surgeons: Special damages: Verdict: Remission: New trial: Error in instructions: Exceptions.

1. Under sec. 1492*f*, Stats. 1898, as amended by ch. 82, Laws of 1899 (providing that no person shall be competent to testify as an expert in matters pertaining to the diseases of animals unless he is registered as therein prescribed), the statement of a witness that he had been a veterinary surgeon in a certain place in the state for forty years is *held* insufficient to qualify him as a veterinary expert.
2. If at the time of the delivery of horses to a purchaser they had contracted the distemper, although the disease did not develop until after they came into his possession, they were unsound within the meaning of a warranty of soundness.
3. In such a case the purchaser may recover for loss occasioned by the distemper being communicated to his own horses by those purchased, if special damages in that respect are properly pleaded and proven, but loss occasioned by the interruption of the purchaser's business due to the sickness of those horses, is not a proper element of damages, in the absence of allegations of special damage in that respect.
4. Where the jury were erroneously allowed to include in their verdict damages for such interruption of business, and the amount awarded therefor was not specified, the error cannot be cured by allowing plaintiff to remit a portion of the verdict.

5. If a trial judge has committed error in instructing the jury, he may grant a motion for a new trial on that ground even though no exception was taken to any portion of the charge.

APPEAL from an order of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

For the appellant there was a brief by *Sanborn, Gleason & Sleight* and *Lyman E. Barnes*, and oral argument by *Richard Sleight* and *Mr. Barnes.*

For the respondents there was a brief by *Henry D. Ryan*, attorney, and *John Bottensek*, of counsel, and oral argument by *Mr. Bottensek.*

CASSODAY, C. J. This action was commenced in the municipal court of Ashland county to recover $450 damages for the alleged breach of warranty on the sale of four horses, and upon issue joined and trial had the plaintiff recovered judgment for that amount. The defendants appealed to the circuit court, and the plaintiff thereupon amended his complaint, and increased his claim for damages to the amount of $1,500. The defendants answered by way of admissions, denials, and counter allegations. At the close of the trial the jury returned a verdict in favor of the plaintiff, and assessed his damages at $800. The defendants thereupon moved the court upon the minutes of the judge to set aside the verdict and for a new trial upon numerous grounds stated, whereupon the court "ordered that the said verdict herein be, and the same is hereby, set aside and a new trial be granted herein, because the court erred in instructing the jury and in rejecting the evidence of the witness F. H. Graves, offered by defendants." From that order the plaintiff brings this appeal.

It is conceded "that the granting of a new trial is very much in the discretion of the trial court, and that its order granting the same will not be reversed unless there clearly appears to have been an abuse of such discretion. . . .

The only exception to this rule is where it affirmatively appears upon the record that such order was based upon a misapprehension of the law." *Schillinger v. Verona*, 85 Wis. 595, and cases there cited; *J. & H. Clasgens Co. v. Silber*, 87 Wis. 357; *Wilson v. Eau Claire*, 89 Wis. 47. The question recurs whether it appears affirmatively upon the record in this case that the order is based upon a misapprehension of the law.

1. One of the alleged errors upon which the order is based is that the evidence of the witness Graves was improperly rejected. He was sworn as a witness on behalf of the defendants, and testified that he had been "a veterinary surgeon" at Appleton for over forty years. He was then asked, "Do you know the disease known as 'distemper' or 'strangles' in horses?" The plaintiff objected on the ground that the witness had not shown himself to be competent, and the objection was sustained. The statute provides that "no person shall practice veterinary medicine and surgery," nor "be competent to testify as an expert witness in any court in matters pertaining to the diseases of animals, unless he be registered" as therein prescribed, and that no person should "be so registered unless he is a graduate," or the holder of a certificate, as therein prescribed, "or shall have practiced veterinary medicine and surgery in this state" for five years, as therein stated. Sec. 1492*f*, Stats. 1898, as amended by ch. 82, Laws of 1899. It does appear that the witness had been a veterinary surgeon at Appleton for many years, but at the time of sustaining such objection it had not been made to appear that he had actually "practiced veterinary medicine and surgery" during any portion of such period; and it was never made to appear that he was ever "registered as a veterinary physician and surgeon," as required by the statute. Thus it appears that the objection to the question was properly sustained. Besides, the witness was subsequently allowed to testify, over objection,

that he had treated horses for forty years and over, and a great many cases of distemper during that time; that from his own experience the usual time of incubation would be from two to four days — might run up to six or eight days — before the glands would be swollen, and that the swelling might not appear until three days after the nose began to run; and that the distemper was not a serious one unless there should be a complication of some other disease with it. We must conclude that the trial court was not justified in treating such rulings as errors.

2. The important question is whether the trial court was justified in holding that there had been error in charging the jury. We perceive no error in the portion of the charge to which exception is taken to the effect that, if the jury found from a fair preponderance of the evidence that the distemper had not fully developed in these horses at the time they were delivered to the plaintiff; that they had at that time contracted the disease; that the seeds of the disease were then in the horses, although it did not develop until after the horses came into the possession of the plaintiff,— then that constituted an unsoundness under the warranty given by the defendants. Thus it has been held that "an allegation that a horse had the glanders at the time of sale is sustained by proof that at such time he had the seeds of that disease, which afterwards developed into the perfect disease." *Woodbury v. Robbins*, 10 Cush. 520. See, also, *Crouch v. Culbreath*, 11 Rich. Law, 9; *Stephens v. Chappell*, 3 Strob. Law, 80; *Hook v. Stovall*, 21 Ga. 72; *Fondren v. Durfee*, 39 Miss. 324; *Kenner v. Harding*, 85 Ill. 264.

3. The only other portion of the charge to which the defendants filed exceptions reads as follows: "In addition to that, the plaintiff claims damages for horses of his own to which the disease was communicated by the horses he got from the defendants." Such mere statement of the "claims" of the plaintiff was not, of itself, error.

But we apprehend that upon the motion to set aside the verdict and grant a new trial the court was not limited to the consideration of such portions of the charge as had been specifically excepted to. It is not so limited in the order appealed from. This court has repeatedly affirmed an order setting aside a verdict and granting a new trial when the ground upon which the order was based was not stated, and the reasons which prompted the court in making such order were not disclosed by the record. *McLimans v. Lancaster*, 57 Wis. 297; *Seaman v. Burnham*, 57 Wis. 568; *Evans v. Rugee*, 63 Wis. 32, 33; *Schraer v. Stefan*, 80 Wis. 654. In one of these cases it is said that: "There seems to have been sufficient evidence here to sustain the verdict. But error may have intervened, or some other satisfactory reason, not apparent to us, may have induced the trial court to set aside the verdict and grant a new trial. We cannot assume that the court made the order it did without a reason, merely because no reason therefor is apparent to us from the record." *Evans v. Rugee, supra.* If, in charging the jury in this case, error intervened, and the trial judge became convinced of such error, then he was justified in basing the order upon that ground, even if no exception had been taken to any portion of the charge.

It seems to be conceded that, if such error existed, it was in that portion of the charge relating to damages. Undoubtedly, the general rule in actions for breach of contract is that the damages to be recovered must be the natural and proximate consequence of the act complained of, and that remote, contingent, uncertain, and speculative damages are to be excluded. *Brayton v. Chase*, 3 Wis. 456; *Ingram v. Rankin*, 47 Wis. 406; *Shadbolt & B. I. Co. v. Topliff*, 85 Wis. 525, and authorities cited in these cases. In the first of these cases the action was for damages for failure to deliver a reaper as agreed, and it was held that evidence was properly excluded which tended to prove that the plaintiff

had large quantities of wheat and oats growing upon his land that year, and that he had sustained a large amount of damage by reason of the breach of the contract to deliver the reaper. Of course, the rule mentioned did not preclude the plaintiff in this action for breach of warranty to allege and prove any legitimate special damages by reason of the horses purchased being diseased as claimed. Following the portion of the charge on damages, already quoted, the court, among other things, charged the jury that: "Two of the plaintiff's own horses — those he had there before he took these horses there — died, and he has stated to you his estimate of the value of those horses that died. Also the amount of loss which he sustained by being interrupted in his logging operations by the sickness of those horses — not being able to keep his men at work. He has estimated that as so much per day for so many days." So far as such charge relates to the disease being communicated to the plaintiff's other horses, it seems to be unobjectionable, since it was specifically alleged in the complaint, and evidence admitted which tended to prove it; but, in so far as such charge relates to the loss which the plaintiff sustained by having his logging operations interrupted by the sickness of those horses, it was clearly erroneous, since nothing of the kind was alleged in the complaint, and the evidence in support of such damages was taken under objection.

Counsel for the plaintiff contends that, even if such portion of the charge was erroneous, still that it can be cured, and a new trial obviated, by allowing the plaintiff to remit from the verdict all but $523.75, which amount, it is claimed, is supported by proper allegations and legitimate evidence. The difficulty with the contention is that, for aught that appears in the record, the jury, or a part of them, may have based their verdict wholly or in part upon the evidence of the plaintiff's claim for loss in business operations. Such

claim amounted to $1,080. We cannot say that there was any error in setting aside the verdict and granting a new trial.

By the Court.— The order of the circuit court is affirmed.

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DAVIS, Respondent, vs. CITY OF APPLETON, Appellant.

February 27 — March 19, 1901.

Municipal corporations: Actions against: Condition precedent: Limitation: Equitable relief: Conveyances: Reference to map: Adverse possession: Streets: Surveys: Estoppel: Structures not in aid of travel: Judgment.

1. The provision of the charter of Appleton (sec. 24, subch. V, ch. 441, Laws of 1885) that except in case of a city order "no action shall be maintained . . . against the city upon any claims or demands of any kind whatsoever, whether arising from contract or otherwise, until" such claim shall have been presented to the common council, is not a condition precedent to the right of action, but is in the nature of a statute of limitation. It is not necessary, therefore, for the plaintiff to allege compliance with the provision, but the answer must set up the failure to comply or the defense will be waived.
2. Such a charter provision is inapplicable to an action for equitable relief only, such as an action to restrain the city from erecting a water tank on land claimed by the plaintiff.
3. A conveyance of a lot "according to" a certain map cannot be held to cover an adjoining strip which, according to said map, is not a part of said lot but is a part of the street.
4. A pleading or finding stating that certain land had been in the actual and continuous occupancy and possession of the plaintiff and her grantors for more than forty years, and that they had during that time erected valuable buildings thereon, but not stating that such possession was adverse or under claim of any exclusive right, is insufficient to show title in the plaintiff by adverse possession.
5. The fact that a city had caused a survey of a street to be made which fixed its width at sixty feet, and had constructed a side-

walk on the line thus established, would not estop it (as against an abutting owner who had done nothing in the way of expenditure of money or erection of buildings in reliance upon the city's action) from claiming, many years after, an additional twelve feet as part of the street.

6. A city has no right to erect on a street a water tank or other permanent structure which does not aid public travel and injuriously affects the beneficial enjoyment of his premises by an abutting owner, or his means of ingress and egress.

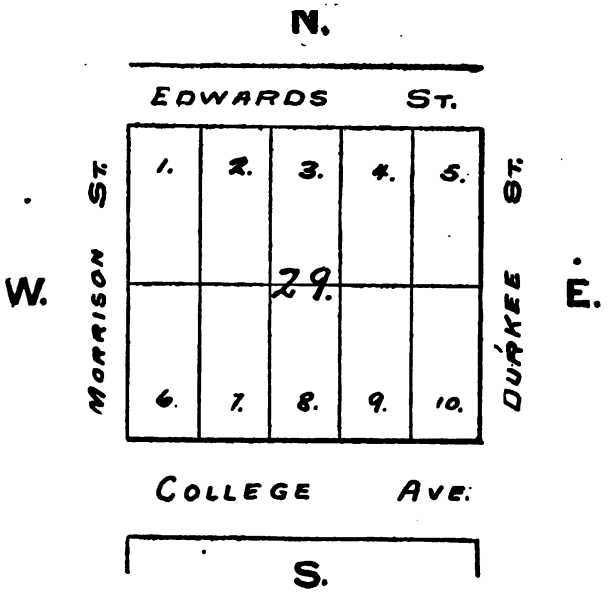
7. In an action between a lotowner and a city involving the title to a strip of land claimed by the city as part of the street, the lotowner was found to have no title to the strip, but the evidence showed that it might be a serious question whether her grantor was not the owner thereof. *Held*, that a judgment adjudging the strip to be a part of the street and that the lotowner remove her buildings therefrom would not be justified.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

This is an action in equity to obtain a perpetual injunction restraining the city from erecting a trestle work and water tank on a twelve-foot strip of land in the city of *Appleton*, which the plaintiff claims to own. The defendant, by its answer, denies the plaintiff's ownership, and claims that said strip of land is part of Johnson street, and by counterclaim asks that the plaintiff be restrained from erecting structures upon said strip or interfering with the city in its use thereof.

The evidence showed that one Amos A. Lawrence, in 1849, caused a survey and plat of certain lands owned by him in the village (now city) of Appleton to be made by H. S. Wright, and caused the same to be recorded in the register's office. In this plat appeared a certain block 29, which block includes the disputed strip in question in this action, and was represented upon the plat as shown on page 582, no distances being given.

At some time after 1849, and prior to the year 1855, it seems that Lawrence deeded to one Beach a lot forty-five



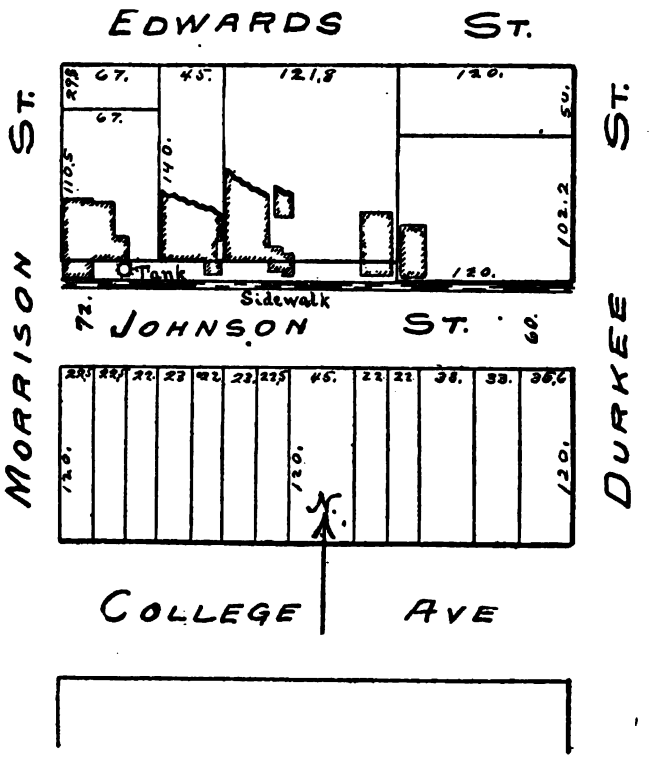
feet in width in said block 29, which lot took a few feet off from the east side of lot 1 as marked upon the Wright plat; and it further appears by inference, rather than by direct testimony, that an alley or street running east and west was actually opened through the middle part of the block, but no plat was ever filed showing the actual location of this street, nor does its actual location upon the ground clearly appear. On the 13th of December, 1855, Lawrence conveyed to Ann Toner a part of lot 1, block 29, describing the parcel as follows: "That part of lot 1 in block 29 extending from the lot occupied by Dr. Beach's barn westward to Morrison street, and from the alley in the center of the block northward to Edwards street." There is no evidence that Ann Toner was ever in actual possession of the premises.

In the year 1857, Ann Toner made a deed to Ann Burke, in which she attempted to convey the premises which had

been conveyed to her by Lawrence, describing the same as follows: "Commencing at the *northeast* corner of block 29, in the village of Appleton, as surveyed by H. S. Wright; running east, on the south line of Edwards street, sixty-seven feet; thence south, parallel to the east line of Morrison street, one hundred and forty feet, to the alley in the center of said block 29; thence west, parallel to the south line of the said Edwards street, to Morrison street; thence north, along the east line of Morrison street, one hundred and forty feet, to the place of beginning,—being the same premises conveyed by Amos A. Lawrence and wife to Ann Toner." The word *northeast* in this description should have been *northwest*, and the mistake was corrected by a deed made June 23, 1867. If the distance of 140 feet named in this deed is controlling, then Ann Burke had no title to the twelve-foot strip in question; but the plaintiff claims that the street or alley named in the deed (now known as Johnson street) was in fact 152 feet distant from Edwards street, and that the lot deeded by Ann Toner to Ann Burke ran to said street. Apparently there was a mistake made as to the number of feet of land in the block north and south amounting to twelve feet.

In 1883, Ann Burke conveyed the premises by the same description to John Loesselyong, who conveyed the same in 1888 to Gilmore and Harriman, and in 1891, by mesne conveyances with the same description, the title became vested in Frederick Harp, Sr., and Frederick Harp, Jr., who gave a mortgage thereon to John Stephens, which mortgage was foreclosed, and the property sold to him, by the same description, in the year 1895. On February 9, 1900, Stephens executed a land contract or bond for deed for the premises to the plaintiff, *Ellen Davis*, in which the land to be conveyed was described as follows: "The south one hundred ten and a half feet of the west sixty-seven feet of lot number 1, in block 29, of the Appleton plat, according to John Stephens map of the said city of *Appleton* for 1872."

It appears that in the year 1872 the city of *Appleton* caused a plat and map of the city to be made and recorded by one John Stephens, in which block 29 was represented substantially as follows (the representation of buildings, sidewalk, and water tank, however, not being in said map):



The question in this case is as to the ownership of the strip of land, twelve feet in width, at the south end of lot 1. The plaintiff claims to own it, but the city claims it as part of Johnson street. In May, 1900, the city authorities proceeded to erect a trestlework, eight feet in height, and a water tank upon the twelve-foot strip adjoining the plaintiff's building, the tank being intended to be used to hold

water for street-sprinkling purposes; and this action was brought to prevent the erection and maintenance of the same.

The evidence showed that in the year 1858 Ann Burke built a hotel building on the premises, which extended over the twelve-foot strip, and up to the line of Johnson street as it would be if it is sixty feet wide. This building was occupied by her as a hotel until 1876, when it was partially destroyed by fire. When she commenced to rebuild, she was warned by the mayor to remove the same off of the twelve-foot strip, and she complied with the demand. There is no testimony as to any claim made by her with regard to the twelve-foot strip, either before or after the fire, nor does it appear ever to have been fenced. Loesselyong, who owned and occupied the premises from 1883 to 1888, says that he used the lot for all purposes, and that there was no fence on the sidewalk line. Harriman, who was part owner from 1888 to 1891, testifies that he occupied the strip for piling purposes. Harp, who owned the premises from 1891 to 1895, built a small addition to the hotel on the twelve-foot strip, but says that he never claimed to own it, and he asked permission of the aldermen to build the addition. The foregoing is substantially all the testimony with regard to the character of the occupation.

On December 6, 1855, the trustees of the village of Appleton by an ordinance attempted to lay out a street through block 29, as follows: "The south line one hundred and twenty feet north of the north line of College avenue, and the north line one hundred and forty feet south of the south line of Edwards street, being *sixty* feet in width." It is certain that, if the north and south lines are rightly described in this ordinance, the street attempted to be laid out is actually seventy-two feet in width. There was evidence that Johnson street was surveyed and staked out by the city authorities as sixty feet in width in 1869, and a

sidewalk built by the city, the north side of which is on the sixty-foot line, but no act on the part of the owners of lot 1 seems to have been influenced by the action of the city in staking out the street and laying the sidewalk. It seems quite clear, on running through all the transactions, beginning with the deed from Lawrence to Toner, that there has been a mistake as to the distance between Edwards street and College avenue, and that the difficulty now arising has resulted therefrom.

The court found that the plaintiff owned the twelve-foot strip in question, and that the erection of the water tank prevented her beneficial enjoyment of the premises and free access to her building from Johnson street, and granted a perpetual injunction against the erection of the tank; whereupon the defendant appeals.

For the appellant there was a brief by *Thomas H. Ryan* and *Lyman E. Barnes*, and oral argument by *Mr. Barnes.*

For the respondent there was a brief by *A. M. Spencer* and *Henry D. Ryan*, attorneys, and *John Bottensek*, of counsel, and oral argument by *Mr. Bottensek.*

WINSLOW, J. The charter of the city of *Appleton* (sec. 24, subch. V, ch. 441, Laws of 1885) provides that, except in the case of a city order, "no action shall be maintained by any person against the city upon any claims or demands of any kind whatsoever, whether arising from contract or otherwise, until" such claim shall have been presented to the common council. Appellant claims that, because the complaint in this case does not allege any such presentation, this action cannot be maintained. There are two answers to the objection: First. The provision is not a condition precedent to the right of action, but is in the nature of a statute of limitation; hence it is not necessary for the plaintiff to allege compliance with it, but the defendant must allege the

failure to comply in defense, or it will waive the point. *O'Connor v. Fond du Lac, ante*, p. 253. Second. Such a provision is very plainly inapplicable to an action for equitable relief solely, like the present action. *Pinkum v. Eau Claire*, 81 Wis. 301.

The question as to whether the plaintiff owned the twelve-foot strip of land upon which the city proposed to erect the trestlework and water tank in question, or whether it was part of the public street, was the question of fact which was chiefly contested upon the trial. The plaintiff's land contract does not cover this disputed strip. The description contained in the contract covers only the south 110½ feet of the west 67 feet of lot 1, block 29, according to John Stephens's map. Reference to this map shows that, as represented thereon, lot 1 does not extend over the twelve-foot strip in dispute, and hence a conveyance of lot 1 "according to" such map cannot, under any known rule of interpretation, be held to convey any part of the strip. This contract is the only paper title which the plaintiff proved. Nor is any claim of title by adverse possession available to the plaintiff. It is neither alleged in the pleadings nor found by the court. The complaint simply alleges generally that the plaintiff has title. The reply to the defendant's counterclaim alleges that the twelve-foot strip has been in the actual and continuous occupancy and possession of the plaintiff and her grantors for more than forty years, and that they have during that time erected valuable buildings thereon, and the findings contain the same statement. It is nowhere alleged or found that such possession was adverse or under claim of any exclusive right, nor would the evidence justify such a finding, and, as this element is necessary in order to create a title by adverse possession, it is evident that the question of such title is not in the case.

But it is claimed that the city is estopped from now claiming that the twelve-foot strip is a part of Johnson street.

We have found no evidence that would justify such a conclusion. It is true that there was evidence tending to show that the city in 1869 caused a survey of the street to be made, which survey probably fixed the supposed width of the street at sixty feet, and constructed a sidewalk on the line so surveyed, but nothing appears to have been done by the plaintiff or her grantors in the way of expenditure of money or erection of buildings in reliance upon the city's action. There are no circumstances such as were proven in the cases of *Paine L. Co. v. Oshkosh*, 89 Wis. 449, and *Reuter v. Lawe*, 94 Wis. 300. The testimony necessary to establish an estoppel against the city in cases of this nature must be clear and distinct, and of such a character as to amount to a fraud to permit the city to claim otherwise. *Ashland v. C. & N. W. R. Co.* 105 Wis. 398. The findings, therefore, which determine that the plaintiff has title to the twelve-foot strip in controversy, and that the city is estopped from claiming the same to be a part of the street, must be and are distinctly overruled.

This determination, however, does not militate against the correctness of the judgment enjoining the city from entering on the strip for the purpose of erecting the water tank and maintaining the same. The plaintiff's rights as equitable owner under her contract up to the line of the twelve-foot strip are undisputed. If the twelve-foot strip be a part of the street (as between her and the city), still the city has no right to erect a permanent structure thereon, which does not aid public travel and injuriously affects her beneficial enjoyment of her premises or her means of ingress or egress. *La Crosse City R. Co. v. Higbee*, 107 Wis. 389.

We construe the judgment as simply enjoining the city from appropriating the twelve-foot strip for the purpose of erecting a water tank thereon, and from using or maintaining the same, and, so construing it, there seems no doubt of its correctness, notwithstanding the plaintiff has not shown herself to be the owner of the strip.

The appellant, however, contends that it is entitled to judgment upon its counterclaim compelling the plaintiff to remove so much of her building as stands on the twelve-foot strip, and enjoining her from erecting any further structures thereon. The conclusions which we have reached, however, forbid such a judgment. It is true we have found that the plaintiff has no title to the strip, but we have not found that the strip is a part of the street. The parties necessary to the determination of that question are not before the court. The evidence shows that it may be a serious question whether Stephens, the plaintiff's grantor, is not the owner of the twelve-foot strip. He is not before the court, no judgment here would conclude his rights, and we do not feel that we would be justified in adjudging that the twelve-foot strip is a part of the street and that the plaintiff should remove her building, when the question as to Stephens's title to the strip has not been determined.

By the Court.— Judgment affirmed.

THOMSON, Respondent, vs. TOWN OF ELTON, Appellant.

109	589
d112	[1]357
112	[2]358
109	589
114	[1]134
114	[1]136

February 28 — March 19, 1901.

Municipal corporations: Money borrowed without authority: Implied contract to repay: Ultra vires: *Pleading.*

1. Where the officers of a town, assuming to act in its behalf and having the appearance of authority, borrowed money, representing that it was to be used for lawful town purposes, and it was so used, and the lender acted in good faith, the law implies a promise to return the money, upon which an action for money had and received will lie.
2. The doctrine of *ultra vires* cannot be invoked by a municipal corporation, in the absence of some prohibitory law, to protect itself from liability to refund money which it has received and of which it has had the legitimate benefit, where the individual dealing with the corporation has parted with his money believing that the corporation had a lawful right to acquire it.

3. A general allegation that the money received by the municipality was used for lawful municipal purposes, so that it had the full benefit thereof, is sufficient upon demurrer. At most such a complaint would be open to a motion to make more definite and certain.

APPEAL from an order of the circuit court for Langlade county: JOHN GOODLAND, Circuit Judge. *Affirmed.*

Action for money had and received, the following facts being stated in the complaint as constituting plaintiff's cause of action, formal parts omitted:

On June 18, 1894, the chairman and clerk of the defendant town, for the purpose of obtaining for it from Frances E. Babcock a loan of $3,000, represented to her that they were duly authorized by such town to obtain such a loan on five years time at eight per cent. interest per annum payable annually, and that the money when obtained would be used for proper and legitimate town purposes. Said Frances E. Babcock believed such representations to accord with the truth, and, relying thereon, loaned $3,000 to defendant, and delivered the same to the chairman of its board of supervisors. Thereafter such chairman turned the money over to the town treasurer and it became a part of the public money of the town. Thereafter such money was used for legitimate town purposes, so that defendant had the full benefit thereof. The chairman and clerk of defendant agreed in its behalf that the money should be repaid at the end of five years from June 18, 1894, with interest at the rate of eight per cent. per annum payable annually. Defendant has neglected and refused to pay said loan, or any part thereof, or the interest thereon except interest to June 18, 1896, and $49.04 of the interest due July 6, 1897. The town has repeatedly ratified such loan and the use thereof. Prior to June 18, 1899, the county of which defendant is a part, pursuant to action taken by its county board, paid defendant $928 to be used in discharge of said loan so far as the same

would go for that purpose. Instead of its being so used, it was diverted from the purpose intended, but was used for legitimate town purposes, so that defendant had the full benefit thereof.

Before March 24, 1900, the claim against defendant on account of the facts stated was for value duly assigned to plaintiff, who is the owner and holder thereof. After such assignment, plaintiff duly filed a verified claim with the defendant, to be placed before its auditing board as required by law. Thereafter an annual town meeting of the town was held, and more than ten days elapsed subsequent to such meeting before the commencement of this action. Favorable action as to plaintiff's claim was neither taken by the board of audit of the town nor the electors at such town meeting.

The defendant demurred on the ground that the facts stated were insufficient to constitute a cause of action. The demurrer was overruled. This appeal is from the order entered on such decision.

For the appellant there was a brief by *M. J. Wallrich*, attorney, and a supplemental brief by *Sanborn, Luse, Powell & Ellis*, of counsel, and oral argument by *C. F. Dillett* and *A. L. Sanborn*. They contended, *inter alia*, that the complaint states no cause of action. There is no allegation that provision has been made for the payment of this debt as required by sec. 3, art. XI, Const. This constitutional prohibition is as effectual against an implied as against an express promise. The complaint does not state facts and circumstances which would authorize the town to make an express promise to repay the money, and if the town could not bind itself by an express promise the law will raise no implied promise. If a recovery can be had in this action, the restrictions imposed by the statute and by the constitution are practically of no avail and may be wholly disregarded by the town officers, and any one having money to loan may simply pay

the same into the treasury of the town and recover it back with interest when he sees fit. A case is not stated where the municipality has power to borrow money, for the reason that the existence of circumstances that will authorize a town to borrow money are unusual, and there is no presumption that they exist. See 1 Beach, Pub. Corp. §§ 216–221, 240–251; *Thomas v. Richmond*, 12 Wall. 349; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 144, and cases cited; *Newbery v. Fox*, 37 Minn. 141, 5 Am. St. Rep. 830; *Mayor v. Ray*, 19 Wall. 468; *Brady v. New York*, 20 N. Y. 312; *Hague v. Philadelphia*, 48 Pa. St. 527; *Nash v. St. Paul*, 8 Minn. 172; *Covington & M. R. Co. v. Athens*, 85 Ga. 367; *Burchfield v. New Orleans*, 42 La. Ann. 235; *Rens v. Grand Rapids*, 73 Mich. 237; *Bogart v. Lamotte*, 79 Mich. 294; *Sutro v. Pettit*, 74 Cal. 332, 5 Am. St. Rep. 442; 1 Dillon, Mun. Corp. § 457; Cooley, Const. Lim. (6th ed.), 261; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503; *Clark v. Des Moines*, 19 Iowa, 199; *Baltimore v. Musgrave*, 48 Md. 272; *Hodges v. Buffalo*, 2 Denio, 110; *Martin v. Brooklyn*, 1 Hill, 545; *Boom v. Utica*, 2 Barb. 104; *Albany v. Cunliff*, 2 N. Y. 165; *Dill v. Wareham*, 7 Met. 438; *Stetson v. Kempton*, 7 Am. Dec. 145; *Lowell F. C. S. Bank v. Winchester*, 8 Allen, 109; *Litchfield v. Ballou*, 114 U. S. 190; *Marsh v. Fulton Co.* 10 Wall. 676; *Donovan v. New York*, 33 N. Y. 291.

J. C. Kerwin, for the respondent, to the point that the money was paid into the town treasury in good faith and used for town purposes, and the law imposes an obligation on the town to do justice, cited *Paul v. Kenosha*, 22 Wis. 266; Beach, Pub. Corp. §§ 222, 226, and cases cited; *Maher v. Chicago*, 38 Ill. 266; *Argenti v. San Francisco*, 16 Cal. 256; Tiedeman, Mun. Corp. § 164, and cases cited; *Norton v. Rock Co.* 13 Wis. 613; 1 Dillon, Mun. Corp. (4th ed.), §§ 459, 460; *Goodall v. Milwaukee*, 5 Wis. 32; *Marsh v. Fulton Co.* 10 Wall. 676; *Waitz v. Ormsby Co.* 1 Nev. 370; *Henderson v.*

Sibley Co. 28 Minn. 515; *Chapman v. Douglas Co.* 107 U. S. 348; *Morville v. Am. T. Soc.* 123 Mass. 129; *Clark v. Saline Co. Comm'rs*, 9 Neb. 516; *Pimental v. San Francisco*, 21 Cal. 362; *Frankfort B. Co. v. Frankfort*, 18 B. Mon. 41; *State Board of Education v. Aberdeen*, 56 Miss. 518; *Dill v. Wareham*, 7 Met. 438; *Peed v. McCrary*, 94 Ga. 487; *Louisiana v. Wood*, 102 U. S. 294; *Bank of U. S. v. Dandridge*, 12 Wheat. 74; *Hitchcock v. Galveston*, 96 U. S. 341; *Gassett v. Andover*, 21 Vt. 342; *Scofield v. Council Bluffs*, 68 Iowa, 695; *Polk Co. S. Bank v. State*, 69 Iowa, 24; *Abbot v. Hermon*, 7 Me. 118; *Cullen v. Carthage*, 103 Ind. 196; *State Board of Agriculture v. Citizens St. R. Co.* 47 Ind. 407; *Brown v. Atchison*, 39 Kan. 37; *Sangamon Co. Sup'rs v. Springfield*, 63 Ill. 66; *Smith v. Barron Co.* 44 Wis. 686; 7 Am. & Eng. Ency. of Law (2d ed.), 946, and note 5.

MARSHALL, J. It is considered that this case is ruled against appellant by *Paul v. Kenosha*, 22 Wis. 266, *Smith v. Barron Co.* 44 Wis. 686, *Brodhead v. Milwaukee*, 19 Wis. 624, and *Lafebre v. Board of Education*, 81 Wis. 660,—particularly by the first and last of such cases. The principle of those cases is that municipalities are bound by moral obligations, as well as individuals, and that where, in case of the latter, such an obligation will give rise to a legal liability, it may have the same effect as to a municipality; that if a municipality obtains money of a person by an illegal sale of property to him, or an illegal contract of some kind, not expressly prohibited by law nor tainted by moral turpitude so that court on grounds of public policy will not recognize it, or the relations growing out of it, to grant relief, and such person acts in good faith in parting with his money, believing the same to be for the benefit of the municipality, and the latter uses the money for its legal and legitimate purposes, to that extent the law will imply a promise to return the same, upon which an action for money had and received

will lie. *Justitia nemini neganda est* applies even to a person dealing with a public corporation. Whether that doctrine is a safe rule in public affairs, and will successfully stand the test of experience, may well be doubted. There might be a wide difference of opinion about it if the matter were open for consideration as an original question. The courts in other states are by no means in harmony in regard to it. However, it has been too long the law of this state to be changed by mere judicial action. The way is open for the legislature to deal with the subject at any time. From the fact that the law as declared by the court has stood without any attempt by the legislature to change it for over thirty years, we must presume that it accords with the public will.

Counsel for appellant contend that this case can be distinguished from *Paul v. Kenosha*, which is to some extent true as to the facts, though in no essential particular, it is believed. But certainly there is no difference between the two in principle. In this case the money was obtained by the officers of appellant, assuming to act in its behalf and having the appearance of authority, to be used for lawful town purposes, and it was so used. In the *Paul Case* the money was obtained of the individual in the same way, as a consideration for the sale of bonds previously made for another purpose, issued therefor, and thereafter acquired by the municipality. The reissue of the bonds was illegal, though, as supposed, for a legitimate purpose; and the money was used for such purpose, though the bonds were as worthless as so much waste paper. No reason is perceived why the case would have been different if, instead of making use of the canceled bonds to obtain the money, the city, without authority, had made a new bond for the purpose, or obtained the money without going through the form of issuing a bond at all. The implied promise upon which the recovery was sustained arose, not from the loan of money to the

municipality, nor the mere illegality of the means used to obtain it, but from the fact that the city, having possession of money to which it had no legal right, used the same for lawful municipal purposes. The implied promise sprang into life at the instant the money was used as a part of the public funds and for purposes for which public money would otherwise have been used.

The authorities that support a municipal liability under circumstances above indicated are too numerous to warrant an attempt to cite all of them. *Salt Lake City v. Hollister*, 118 U. S. 256; *Pimental v. San Francisco*, 21 Cal. 351, 362; *Louisiana v. Wood*, 102 U. S. 294; *Read v. Plattsmouth*, 107 U. S. 568; *Gause v. Clarksville*, 5 Dillon, 165, 180; *Allen v. La Fayette*, 89 Ala. 641; *Scofield v. Council Bluffs*, 68 Iowa, 695.

Much time might be spent in reviewing the foregoing and other cases, but it is thought that nothing after all could be added to what has already been said in previous decisions of this court to which we have referred, so we forego further discussion.

It is firmly established here that the doctrine of *ultra vires* cannot be invoked by a corporation, in the absence of some prohibitory law, to protect itself from liability to refund money which it has received and had the legitimate benefit of. That is most generally invoked in cases where private corporations are involved, but it applies just the same to public corporations, where the individual dealing with the corporation acts in good faith,— that is, parts with his money or property to the corporation believing that it has a lawful right to acquire it.

Some complaint is made that, admitting the principle contended for by respondent's counsel, the complaint is insufficient because it does not show, by proper allegations of facts, that the money received by appellant was used for lawful town purposes; that the general allegation to that

effect is a conclusion of law. We cannot agree to that. Whether the money was used for legitimate town purposes or not is a question of mixed law and fact that may properly be pleaded according to the legal effect of the facts. *Iowa Co. v. Mineral Point R. Co.* 24 Wis. 93. At most the complaint was open to a motion to make more definite and certain. In a complaint for money had and received under the old system of pleading, the facts were pleaded according to their legal effect, and it has been repeatedly held that a statement of facts good at the common law in actions like this is sufficient under the Code. Bliss, Code Pl. 299, and cases cited. In *McKinnon v. Vollmar*, 75 Wis. 82, a complaint in such an action, containing the very meager common-law allegations, was sustained. No particulars of the claim were stated in the complaint, and there was no bill of particulars given or demanded. It is possible that the framers of the Code did not contemplate such a result of their work when they said, "The complaint shall contain a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition;" but such construction was adopted by the courts in the state from which we took the Code, before its adoption here, though at a time when there was a strong inclination to hold onto old forms and ingraft them onto the new system so far as possible. That was done, and it is believed the courts went beyond reason in some cases. But in respect to the matter under discussion, it may well be said that if a complaint for money had and received, no more definite in form than is required by the rules of the common law, does not come within the letter of sec. 2646, Stats. 1898, as to containing a plain and concise statement of the facts constituting the cause of action, it cannot be held bad on demurrer, since the statute requires the allegations of a pleading, for the purpose of determining their effect, to be liberally construed with a view to substantial justice between the parties. Sec. 2668, Stats. 1898. That requires

that every reasonable intendment and presumption shall be made in favor of a pleading. *Morse v. Gilman*, 16 Wis. 504; *Miller v. Bayer*, 94 Wis. 123. If the language of a complaint will reasonably admit of a construction that will support it, that construction is to be sought for and adopted when found, instead of one that will condemn it. To that end all facts reasonably inferable from facts expressly alleged are to be deemed set forth and as forming a part of the pleading. *Kliefoth v. N. W. I. Co.* 98 Wis. 495; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125; *Valley I. W. Mfg. Co. v. Goodrick*, 103 Wis. 436.

We should say before closing this subject that in *Paul v. Kenosha*, 22 Wis. 266, the allegation as to the use of the money was substantially the same as in the case before us, and it does not appear to have occurred to court or counsel then that the complaint was insufficient. This is the language: "The money was solicited and received by the defendant for the legitimate municipal purposes of the defendant, and not for any other or different purpose. It was placed in the city treasury with the other money and funds of such city, kept and used for municipal purposes, and wholly used by the defendant for its legitimate municipal purposes."

What has been said requires the order appealed from to be affirmed.

By the Court.— So ordered.

SCHLEI, Appellant, vs. STRUCK, Respondent.

February 28 — March 19, 1901.

Boundaries: Surveys: Fences: Adverse possession: Estoppel: Court and jury: Evidence: Fences in adjoining section: Records of public officers: Admissibility: Appeal: Bill of exceptions.

1. In an action of ejectment involving the location of a boundary line, it is *held*, upon the evidence, to have been for the jury to say whether the fences between the parties were built by agreement and whether either party had by his conduct or by long acquiescence estopped himself, and also to say which of three differing surveys, each of which located the true line on defendant's side of the fence, was correct.
2. Evidence as to how a fence on a disputed line agrees with fences in an adjoining section is inadmissible, unless the natural boundaries or monuments and the monuments or stakes set in the course of the original survey cannot be found.
3. As a general rule, when public officers are required by statute to make a record of official acts, such records are admissible in evidence if relevant to the controversy.
4. Where a record is offered in evidence and rejected, and the question of its admissibility is to be raised on appeal, so much of it as will enable the court to consider the question intelligently must be preserved in the bill of exceptions.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

This is an action of ejectment to recover possession of two small tracts of land,— one on the south side of the S. E. ¼ of the N. E. ¼ of section 16, town 19, range 21 E., commencing at the southeast corner and running west 9.90 chains, and being .26 chains wide at the west end and .40 chains wide at the east end. The other is a strip of land somewhat irregular in shape, on the south side of the N. W. ¼ of the N. E. ¼ of the same section. On the trial a verdict was directed for defendant on the ground that there was no sufficient evidence of plaintiff's title to go to the jury. The plaintiff has appealed from the judgment in defendant's favor.

For the appellant there was a brief by *Nash & Nash*, and oral argument by *L. J. Nash*.

For the respondent there was a brief by *C. E. McMullen*, attorney, and *J. E. McMullen*, of counsel, and oral argument by *J. E. McMullen*.

BARDEEN, J. The plaintiff owns the E. ½ and the N. W. ¼ of the N. E. ¼ of section 16. The defendant owns the S. W. ¼ of the N. E. ¼ and the N. E. ¼ of the S. E. ¼ of the same section. One of the disputes between the parties relates to the true location of the east and west quarter line of the section. The plaintiff insists that the quarter post on the east line is lost, and that the quarter line should be run equidistant between the two section corners. To establish this contention, he produced three surveyors who had made surveys of the section. It is unnecessary to canvass the testimony of these witnesses in detail. No two of them agreed upon the exact location of the line. Mr. O'Hara, who made a survey in 1895, located the east quarter post about five rods south of the fence maintained by defendant. He admitted on the trial that this post should have been placed about three and one-half rods further south. The defendant was not satisfied with this survey, so he employed Mr. Ertz to make a survey in 1896. Ertz made another survey in 1897, and found that defendant's fence was forty links, or twenty-seven feet, too far north at the east end, and twenty-six links, or seventeen feet, at the west end. Mr. Pitz also made a survey in 1897, which varied from the others and gave the plaintiff more land than either of the other surveys. There is no question but that defendant's fence is some distance north of either of the three lines established by the surveyors. As near as we can get at it from the mass of testimony produced, defendant claims that he built his fence in 1878 in accordance with some line pointed out by the plaintiff, and in accordance with other fences in that neigh-

borhood. The plaintiff claims that this, as well as the other fences in dispute, was not intended to be permanent, as no one knew the true location of the division lines. Testimony was offered in support of the claims of each, and in most instances was in direct contradiction. The fence on the south side of the N. W. ¼ of the N. E. ¼ was built of stumps, and is somewhat irregular in its course. It is some distance north of the line established by the surveyors. It was first built in 1875 or 1876, and defendant claims twenty years' adverse occupancy. The circumstances connected with the building of this and the other fences are in dispute between the parties, as well as the location of the true line between them as fixed by the surveyors.

The contest was one peculiarly for the jury. The evidence either way is not so overwhelming as that this court can say there was nothing to be submitted to the jury. On the contrary, there were sharp disputes, conflicting inferences, and important deductions to be drawn from the testimony, which made the issues proper for jury determination. It was for the jury to say whether the fences were built by agreement, and whether either party has by his conduct or by long acquiescence estopped himself. It was for the jury to determine which of the surveyors' lines was the correct one. Counsel for the defendant seems to think that, because they failed to agree in their surveys, there was no basis upon which the jury could act. As to the quarter line, they all agreed that plaintiff's fence was too far north. Now, unless the jury find that such fence was put there under an agreement as to the true line, and has been maintained under such circumstances as that plaintiff is estopped from questioning it, or that the land sought to be recovered has been adversely occupied for such a length of time as to preclude recovery, they must necessarily determine which of the surveyors' lines is the correct one. Under any view of the case, this variance in the testimony did not invest the

court with authority to disregard the testimony entirely, or to direct a verdict for either party. We have mentioned but a few of the most prominent facts that seem to command a submission of this case to the jury. Others appear in the record, and need not be specifically mentioned. A new trial may relieve the case of many of its seeming embarrassments.

The testimony as to how defendant's fences agreed with fences in an adjoining section was immaterial, and should have been rejected. *Fairfield v. Barrette*, 73 Wis. 463; *Fuller v. Worth*, 91 Wis. 406. This rule, however, may have to yield if the case is brought within the principle stated in *Galesville v. Parker*, 107 Wis. 363, and cases cited.

As regards the refusal of the court to allow the plaintiff, in rebuttal of the testimony of August Schmidt, to show by the county surveyor's record matters to dispute such testimony, the bill of exceptions is not sufficiently definite to give us a basis upon which to determine the question. The witness had testified at length regarding a survey made in 1868 or 1869 by Fayette Ormsby, the then county surveyor. The law required him to keep a correct and fair record of all surveys made by him, in a book provided by the county for that purpose, and to preserve the field notes and calculations of each survey. The law nowhere declares the legal effect of such records, but the rule is general that, when persons in public office are required by statute to make a record of their official acts, such records are admissible in evidence if relevant to the controversy. Jones, Ev. § 520. With this in mind, both the counsel and the court will be able to keep from error on another trial. The poverty of the record as to the substance or contents of the rejected evidence renders it impossible for us to say the court erred in the matter complained of. What was said by this court in *Dodge v. O'Dell's Estate*, 106 Wis. 296, demonstrates the necessity of carefully preserving in the bill of exceptions so

much of the rejected records as will enable us to intelligently consider the question raised.

By the Court.—The judgment is reversed, and the cause is remanded for a new trial.

KRAMER, Administratrix, Appellant, vs. WILLY and another, Respondents.

February 28—March 19, 1901.

Master and servant: Death from boiler explosion: Negligence of repairer: Contributory negligence: Necessity of pressure test.

1. In an action to recover for the death of an engineer who was killed by the explosion of a boiler of which he had charge in defendants' mill, it appeared, among other things, that three days before the explosion the deceased discovered a small leak in a horizontal seam in the boiler; that he reported it to defendants, who thereupon employed a skilled boiler repairer to do whatever was necessary; that such repairer made a careful visual examination and a hammer test without discovering any signs of weakness, and then calked the seam and stopped the leak: that he also asked the deceased whether he should make a pressure test, but was told not to do so; and that the explosion occurred the following day when steam was generated in the boiler and had reached a pressure of between ninety and a hundred pounds. Plaintiff's evidence also showed that it was not customary for repairers to take other precautions than those taken, and no negligence prior to the discovery of the leak was claimed. Inspection of the boiler after the explosion showed that there was an old crack in the underlying lap of steel, extending several feet horizontally between the rows of rivets, which, however, did not extend through the whole thickness, and could not have been discovered either by external or internal inspection or by sound. *Held*, that the defendants were not liable.
2. At least as much knowledge of the necessity of a pressure test in a boiler in which a leak has been stopped by calking is to be imputed to a trained engineer as can be assumed by a court by virtue of its imputed acquaintance with merely the common knowledge on that subject.

APPEAL from a judgment of the circuit court for Outagamie county: FRANK M. FISH, Judge. *Affirmed.*

Suit by plaintiff, who is administratrix and widow of William H. Kramer, deceased, to recover damages for his death, resulting January 17, 1899, on the explosion of a steam boiler, the property of, and in the flouring mills of, the defendants.

The plaintiff's evidence disclosed that the deceased at the time of his death was thirty-three years of age; that up to about nine years before he had been a farmer. At that time he came to Appleton, and was apprenticed to the tinner's trade, and worked at various occupations until 1895, when he became employed as a fireman for the defendants, and was employed in that capacity, either by them or others, from that time to some four months before his death. During a considerable part of the time of his employment by the defendants as a fireman he served as engineer, and something like four months before the accident he became their chief engineer, and thence up to the time of his death had charge of their boilers and steam power. The boiler in question had been used about four years, and was manufactured for the defendants by manufacturers having reputation amongst the best boiler makers in the United States, and was of superior materials. It was sixteen feet long by seventy-two inches in diameter, consisting of a steel shell three eighths of an inch thick, with seams fastened with a double row of rivets two and one-half inches apart, and rested upon a brick foundation. The boiler had been in continuous use and carefully cared for, and needed no repairs until a few days previous to the explosion, when the deceased discovered a slight leak in a horizontal seam. He notified the owners on Sunday, January 15th, who employed one Fairbanks, running the only boiler shop in Appleton, with large experience and good standing and repute as a repairer of boilers. After looking at the boiler, he indi-

cated a portion of the brick wall needing to be removed, and the following day came, and, under the directions of the deceased, proceeded to examine and repair the boiler. He examined it carefully inside and out, discovered no defects after emptying and filling it with water two or three times, except the slight leak referred to, and attempted to calk it. As he did so, the leak, which had formerly been for only some four inches of the seam, extended along until he had completed his calking for a distance of several feet and stopped the leak. He then inquired of the deceased, "Shall we test the boiler?" to which deceased replied, "No; it is not necessary." He accordingly went away, the brick foundation was replaced, steam generated the following day, and when it reached somewhere between ninety and 100 pounds pressure the boiler exploded, killing the deceased, who was engaged in his duties about the same. It was then found that in the underlying lap of steel, at about the place where the leak had been, was an old crack extending horizontally a distance of some feet between the two rows of rivets. This crack did not extend through the whole thickness of the metal, but varied in depth from one sixteenth of an inch to nearly the whole thickness, and is assumed to have been the cause of the explosion. It could not be discovered by either external or internal inspection nor by sound. Plaintiff's witnesses all testified that, if there were any reason to apprehend a defect, the proper precaution was to test the boiler by a cold-water pressure test, and that thereby the defect in question would have been discovered; also that, if calking was effective to stop the leak, one would not apprehend such defect. The defendants had no knowledge of the condition of the boiler save such as they derived from the deceased himself. The leak was such a one as ordinarily an engineer would repair without sending for a boiler maker.

At the close of plaintiff's evidence, on motion, judgment of nonsuit was granted, from which the plaintiff appeals.

For the appellant there was a brief by *A. M. Spencer*, attorney, and *John Bottensek*, of counsel, and oral argument by *Mr. Bottensek.*

Lyman E. Barnes, for the respondents.

DODGE, J. The case made by plaintiff's evidence, though accorded the most favorable inference, clearly fails to show any negligence by defendants in ascertaining and maintaining the safety of the boiler which the deceased operated. Due care in its original purchase is affirmatively shown. Frequent and careful inspection by the engineer in charge is also proved up to the time when it passed into the care of the deceased. There is no evidence as to such precautions during the four months of his control, but such omission cannot adversely affect defendants, both because negligence must be proved affirmatively, and because, if there were omission of usual precaution in this respect, it would be the negligence primarily of the plaintiff's intestate. But, indeed, there is no claim of any negligence during any period preliminary to the discovery of the leak on the Saturday preceding the Tuesday of the explosion. Of this leak the defendants are not shown to have had any knowledge except such as they derived from the deceased, who was in charge of the apparatus, a man of mature years, who had, to the knowledge of defendants, between four and five years' experience in operation of boilers either as fireman or engineer, and who, by accepting the latter position, had asserted his own qualifications. Upon his notification, the defendants employed a boiler repairer of standing and repute to do what was necessary, under decedent's directions. It is difficult to conceive any greater care which they could have exercised for their employee's safety, except, perhaps, to discharge him from the employment in proximity to a leaking boiler.

But plaintiff contends that at this point the boiler repairer

became the representative of the employer, and that he was guilty of omission to do all that could have been done to ascertain whether there was other defect in the boiler than mere opening of seams; insists that he might have cut away the bolts, and examined the steel plates where they lapped over each other, and might have applied the water-pressure test, either of which would have disclosed the crack or fissure which existed. Plaintiff's witnesses testify that customarily nothing of the sort would be done if calking proved effective to stop the leak, and that, if any suspicion of weakness were justified, the usual precaution would be to test the boiler. The repairer, Fairbanks, excluded responsibility for the leak of any break in the iron by careful visual examination and by the hammer test, and he effectually stopped the leak by calking. Under the evidence, he might consistently with due care have stopped there, but he did not. He submitted to the plaintiff's intestate the question whether he should make a test of the boiler, and was by him directed not to do so. It appears conclusively by plaintiff's testimony that this conduct was not negligent; that it was the usual and customary caution under the circumstances.

Counsel, however, urges that we must hold as matter of common knowledge that the omission of the pressure test is negligence, since it might have disclosed the weakness. This contention, if sustained, must equally defeat plaintiff's recovery; for her intestate voluntarily accepted the risk of such omission with full knowledge of its occurrence. To him, a trained engineer, is certainly to be imputed as much knowledge of the necessity or propriety of such test as can be assumed by a court by virtue of its imputed acquaintance with merely the common knowledge on the same subject. If we can know that such omission was negligence, certainly he must have known it and must be chargeable with assumption of any risk so occasioned. To summarize the

situation: The evidence fails to disclose any omission by the defendants of the precautions usual and customary, and, as to the only omission of any precaution, shows affirmatively that it occurred with the knowledge and assent of the plaintiff's intestate. Under rules of law, now so trite as to call for neither reiteration nor citation of authority, the defendants cannot be held liable, and judgment of nonsuit was proper.

By the Court.—Judgment affirmed.

WOODWARD, Respondent, vs. SMITH, Appellant.

February 28—March 19, 1901.

Nonnegotiable instrument: Failure of consideration: Court and jury: Contracts: Performance: Mutuality.

1. In an action upon an order for the payment of money out of a specified fund, brought by an indorsee against the drawer, the defendant's evidence tended to prove that the order was given as part payment on a contract with the payees by which they were to drill for defendant, at specified prices per foot, until a flowing well was obtained or they were ordered to stop—payment to be made when the work was completed; that the plaintiff knew of the contract and induced defendant to give the order by fraudulently representing that, if it were given, he would furnish the payees the necessary material to complete their contract; and that after said order was given the plaintiff refused to furnish said material and the payees stopped drilling, although they had not obtained a flowing well and were not ordered to stop. *Held*, that the question whether the consideration for the order failed should have been submitted to the jury.
2. A contract with well-drillers by which they were to drill until a flowing well was obtained or they were ordered to stop, at fixed prices per foot depending on the distance drilled, is not void for want of mutuality.

APPEAL from a judgment of the circuit court for Outagamie county: JOHN GOODLAND, Circuit Judge. *Reversed.*

The cause was submitted for the appellant on the brief of *Phillips & Hicks*, and for the respondent on that of *Wigman, Martin & Martin.*

CASSODAY, C. J. This action is to recover $600, with interest from June 1, 1897, alleged to be due to the plaintiff on an order executed by the defendant on the day and year last named, upon the Buckstaff-Edwards Company, whereby he directed that company to pay Woodward & Erickson $600, and to charge the same to his account, and which order was, for value received, assigned to the plaintiff. It was alleged that the corporation and the defendant each refused to pay such order after due demand.

The defendant answered by way of admissions, denials, and counter allegations to the effect that January 2, 1897, the defendant entered into an agreement with Woodward & Erickson wherein and whereby they agreed to drill for the defendant a flowing well,— they to furnish the materials and do all the work necessary, and to drill until they procured a flowing well or until they were ordered by the defendant to stop drilling; that the defendant was to pay therefor $1 per foot for the first 200 feet, $1.25 per foot for the next 200 feet, and $1.50 per foot for the balance, until the same should be completed, and to board them and advance to them small sums of money from time to time for spending money only, but that the bulk of the payments was to be made only when the work should be completed; that Woodward & Erickson entered upon the performance of the contract, and continued such work thereunder until such order was given; that during that time the defendant boarded them and advanced to them small sums of money, as requested, amounting in the aggregate to $60; that June 1, 1897, Woodward & Erickson represented to the defendant that they had gone to the end of their rope, and that it was necessary for them to procure more rope, in order

to drill deeper; that the plaintiff, who is the father of George E. Woodward, one of the members of that firm, had been furnishing them material from time to time and would furnish them with enough to finish the contract; that June 1, 1897, the plaintiff represented to the defendant that he was furnishing the material and had furnished the material for Woodward & Erickson to perform the work, and falsely and fraudulently, and with intent to deceive the defendant and to procure from him such order without consideration, represented to him that he would furnish to Woodward & Erickson more and sufficient material to complete their contract, provided the defendant would give such order; that, relying upon such representations and promises, he was induced to give such order, which was without consideration and void; that, upon procuring the order, Woodward & Erickson continued to drill for a short time, until they got to the end of all the rope they had, and then the plaintiff refused to furnish more material, as he had agreed, and they refused to complete their contract and removed their drill and engine; that thereupon the defendant directed the corporation to withhold payment on the order until further directed; that they did not complete the well; that it was not a flowing well, and was worthless to the defendant; and that he was ready to perform his contract. At the close of the testimony the court directed a verdict in favor of the plaintiff for the amount of the order and interest. From the judgment entered upon that verdict the defendant appeals.

This case was here upon a former appeal, and was reversed because the court excluded essential evidence on the part of the defendant, and then directed a verdict in favor of the plaintiff. *Woodward v. Smith*, 104 Wis. 365. On the last trial such evidence was admitted, but the court nevertheless directed a verdict in favor of the plaintiff on the ground that the defendant had "failed to establish his defense in this case." Certainly the testimony of the defend-

ant tended to prove that the contract was as alleged in the answer; that the order was procured from the defendant by the plaintiff personally, and upon his representations and promises; that, when Woodward & Erickson stopped work and abandoned the job, they had drilled to the depth of 540 feet; that they never got a flowing well, and that the defendant never ordered or directed them to stop drilling, but that they stopped of their own accord and refused to drill further. Such testimony of the defendant was corroborated by several witnesses, and to some extent by Erickson. Such evidence was sufficient to take the case to the jury, notwithstanding the evidence to the contrary on the part of the plaintiff.

It is contended on the part of the plaintiff that there was a want of mutuality in the contract. The contract was by parol. The parties differ as to its exact terms. For the purposes of this appeal, it must be assumed that the contract was as testified to by the defendant. If such were the terms of the contract, then Woodward & Erickson were bound to continue drilling at the prices named until they got a flowing well or should be directed to stop by the defendant. There is nothing in the recent decisions of this court to support the contention of counsel for the plaintiff that there was such want of mutuality. *Hoffman v. Maffioli*, 104 Wis. 630; *Teipel v. Meyer*, 106 Wis. 41. On the contrary, the principles conceded in those cases show that such a contract, if made, was binding upon Woodward & Erickson and the plaintiff as their assignee.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

CITY OF CHIPPEWA FALLS, Respondent, vs. HOPKINS, Appellant. 109 115 611 *142

February 28 — March 19, 1901.

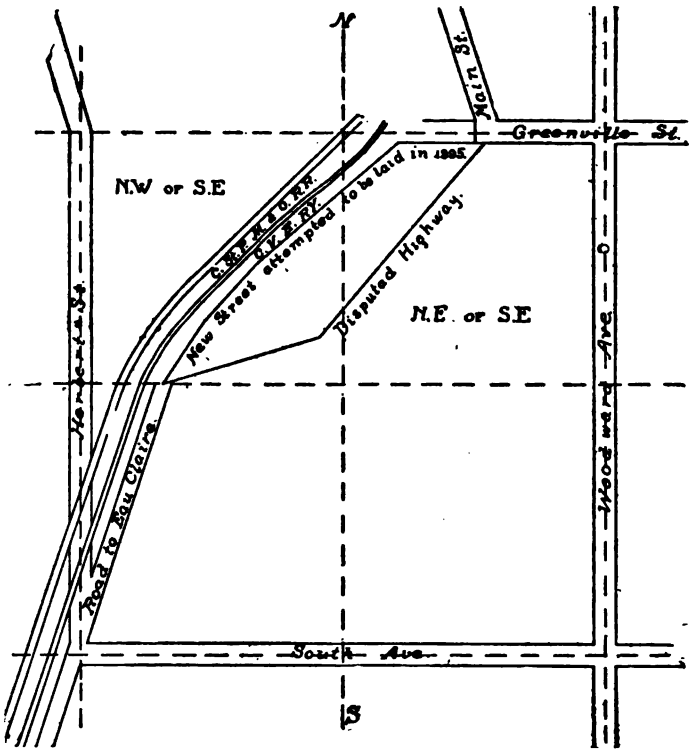
Municipal corporations: Highways: Removal of obstruction: Direction to commence proceedings: User: Discontinuance: Statute declaratory of common law: Effect of repeal: Estoppel: Pleading.

1. Plaintiff city attempted to lay out an extension of G. street to take the place of an existing highway, but admittedly failed by reason of defects in the proceedings. After said extension had been used for about two years the owner of the land closed it up, and also closed up the old highway, which, however, had never been entirely abandoned by the traveling public. Subsequently the common council directed the city attorney to commence proceedings against said land owner "for the removal of an obstruction placed by him across the extension of G. street." *Held*, a sufficient direction for the commencement of proceedings for the removal of the obstruction from the highway as it existed before the attempted change, although such highway had never been named and its designation as an extension of G. street was not entirely accurate.
2. A well-established principle of the common law is not abrogated by the repeal of a statute merely declaratory thereof.
3. A highway may be established by twenty years' adverse user alone.
4. A highway is not discontinued by the attempted laying out of another to take its place, where the proceedings for laying out the new highway are void and it never became a highway in fact.
5. Where an estoppel is relied upon as a defense it must be pleaded.

APPEAL from a judgment of the circuit court for Chippewa county: JAMES O'NEILL, Judge. *Affirmed.*

This is an action in equity, brought by the city to compel the removal of obstructions from an alleged highway and to enjoin any further obstruction thereof. The defendant in his answer denies the existence of any highway at the place in question. The evidence upon the trial showed that the defendant is the owner of the N. E. ¼ of the S. E. ¼ and the N. W. ¼ of the S. E. ¼ of section 7, and that such land is within the limits of the city of *Chippewa Falls*. The dis-

puted highway runs in a general southwesterly direction through a part of each forty acres. The following map shows the situation, the line marked "Disputed Highway" being the center line of the alleged highway:



The claim of the city was that a highway existed on said line by user only for more than twenty years prior to the year 1895.

The court found as facts that at the time of the commencement of the action a highway existed in the city of *Chippewa Falls*, the center line thereof being the line marked upon the plat as "Disputed Highway;" that said highway had been opened, used, and traveled by the general public con-

tinuously for more than twenty years before the summer of 1895, and during all that time had been the main traveled highway leading from *Chippewa Falls* to the village of Badger Mills and the city of Eau Claire; that in 1895 certain officers of the city of *Chippewa Falls* attempted to change the course of said highway where it crosses the defendant's land, by opening another highway through another part of said land, but that said new highway was opened without defendant's consent and without any proceedings to comply with the law regulating the opening and laying out of highways; that after the opening of said new road, for about two years, nearly all the travel was diverted to and passed over said new road, but that the old highway first described was never entirely abandoned by the traveling public, and no proceedings were taken to vacate or discontinue the same; that in the year 1897 the defendant fenced in and plowed the said new road or highway, and has kept the same inclosed and plowed ever since, and entirely prevented any use thereof by the public, and denied that the public had any rights therein; that in the year 1897 the defendant also erected fences across the said old highway, so as to entirely prevent public travel thereon, and still maintains said fences; that the commencement of this action was duly authorized by the common council of the plaintiff city.

As conclusions of law the court found that the pretended alteration of said highway in 1895 was illegal and void, and that the same was never altered, abandoned, or discontinued; that the old highway is still a lawful highway in said city; that the defendant, by obstructing said new road and preventing use thereof, is estopped from claiming that the same constituted a valid alteration of the old highway. Upon these findings judgment was entered for the plaintiff according to the prayer of the complaint, and the defendant appeals.

For the appellant there was a brief by *W. H. Stafford*

and *John P. Wall*, attorneys, and *H. H. Hayden*, of counsel, and oral argument by *Mr. Hayden.*

W. M. Bowe, city attorney, for the respondent.

WINSLOW, J. Many exceptions were taken by the appellant, but there are but four questions which require discussion.

1. Was it shown that the commencement of this action was properly authorized by the common council? The action was commenced by the city attorney, the complaint being verified by the acting mayor. By the charter of the city (ch. 164, Laws of 1885), the general control of city affairs, including removal of obstructions from streets, is vested in the common council by the usual provisions. By sec. 5 of subch. IV of the charter it is provided that "the city attorney shall conduct all the law business of the corporation and of all departments thereof, and all other law business in which the city shall be interested *when so directed* by the common council." Prior to the commencement of this action, on March 8, 1898, the following resolution was passed by the common council: "That the city attorney be, and he is hereby, authorized and directed to commence an action against *Wilson Hopkins* for the removal of an obstruction placed by him across the extension of Greenville street in said city." It is claimed by appellant that the commencement of an action like the present is included under the head of "other business," and hence that it must be directed by the common council; that the alleged highway in question is not in any proper sense an "extension" of Greenville street, but that the highway attempted to be opened by the city in 1895, without compliance with the provisions of law, must be considered as the extension of Greenville street referred to in the resolution.

Conceding for the sake of the argument, but not deciding, that the bringing of the action must first be authorized by

the common council, we think that the resolution of the council, when fairly considered, is sufficient authority. It was amply proven that the proceedings by which the council attempted to lay out the supposed extension westward of Greenville street in 1895 were fatally defective, because there was never any notice given to the landowner of the proposed taking, no establishment of the necessity of condemnation by a jury, and no damages ever awarded or paid, and that the same was permanently closed up by the landowner in 1897. Thus it is evident that this supposed extension of Greenville street did not exist in March, 1898, either *de facto* or *de jure*. Reference to the map shows that any person traveling on Greenville street in a westerly direction might, and probably would, consider the disputed highway as an extension of Greenville street to the west and south. While the highway itself has not been named, and its designation as an extension of Greenville street is not perhaps entirely accurate, there seems no doubt but that the council intended to refer to it in the resolution above quoted. Neither strict nor technical construction should be applied to the terms of such an authority.

2. Are the findings of fact sustained by the evidence? There was considerable evidence both ways upon these questions, especially upon the question as to the amount of travel over the disputed highway, and the question as to whether such travel was confined to a single well-defined track. It would hardly be profitable to review it, and it must be sufficient to say that examination of the proof shows that there was ample evidence to sustain the findings.

3. Has the common-law principle that a highway may be established by twenty years' user been abolished in this state? By sec. 85, ch. 19, R. S. 1858, it was provided that "all roads not recorded which shall have been used as public highways twenty years or more, and roads not recorded which shall hereafter be used ten years or more, shall be

deemed public highways." This section was repealed, in the Revised Statutes of 1878, before either the twenty-year period or the ten-year period had elapsed as to the highway in question here, and the following provision took its place (R. S. 1878, sec. 1294): "All roads not recorded which shall have been or shall be used *and worked* as public highways ten years or more shall be deemed public highways." The appellant's contention is that by this latter statute the common-law principle that a highway may be established by twenty years' user alone (if any such principle exists) is abolished in this state, and that since the passage of that statute no highway can be created by user alone, but that working must be combined therewith. With this contention we cannot agree. In *Lemon v. Hayden*, 13 Wis. 159, and in *Wyman v. State*, 13 Wis. 663, it was held in effect that the use of a definite highway by the public for twenty years with the assent of the owner was conclusive evidence of dedication, and in the first case cited it was further said that the first clause of the section quoted from the Statutes of 1858 was simply declaratory of the common law. The principle that twenty years' user alone is sufficient to establish a highway by user is either expressly or impliedly recognized in the following subsequent cases in this court: *Hanson v. Taylor*, 23 Wis. 547 (overruling *State v. Joyce*, 19 Wis. 90); *State v. Castle*, 44 Wis. 670; *Pewaukee v. Savoy*, 103 Wis. 271; *Stricker v. Reedsburg*, 101 Wis. 457.

The proposition that a well-established principle of common law has been abrogated by the repeal of a statute which was simply declaratory of the common law is novel, to say the least, and will not bear examination. If a law should be passed declaring that an assault and battery was a tort and that the injured party should have a cause of action to recover damages therefor, we do not suppose it would be argued that the repeal of the law would put an end to all civil liabilities for assault and battery. By section 13 of article

XIV of the constitution of this state such parts of the common law as were in force at the time of the adoption of the constitution continue a part of the law until altered or suspended by the legislature. An act which is simply declaratory of a common-law principle gives no substantial right. How, then, can its repeal take away any substantial right? The question seems to answer itself. An analogous question arose in the case of *Wilson v. Henry*, 40 Wis. 594, where it was argued that the statutory definitions of the conditions necessary to establish adverse possession under paper titlé excluded all other conditions; but it was held by this court that whatever would constitute adverse possession under paper title outside of the statute (i. e. at common law) still constitutes it, notwithstanding the statutory definitions. We conclude that the repeal of sec. 85, ch. 19, R. S. 1858, and the enactment of sec. 1294, R. S. 1878, did not alter or suspend the common-law rule that a highway may be created by user alone for twenty years, but simply added the requirement of working to make complete the operation of the ten-year statutory user.

4. It is claimed that the old road was discontinued by the laying out and opening of the supposed new highway in 1895, or at least that the city is estopped from now claiming the existence of the old highway. Neither of these claims is tenable. As to the first proposition, it is sufficient to say that the supposed new highway was never a highway in fact, and that to constitute a discontinuance of a highway by the laying of another to accomplish the same purpose, that other must necessarily be laid. This seems self-evident. As to the second proposition, we have found no acts of sufficient significance on the part of the defendant, resulting from the city's action, to justify the application of the principle of estoppel, and furthermore no such defense was pleaded.

By the Court.—Judgment affirmed.

NELSON, Appellant, vs. CITY OF SUPERIOR, Respondent.

February 28 — March 19, 1901.

Municipal corporations: Superior city charter: Firemen are "officers:" Salary: Change during term: Agreement to accept less than legal salary: Estoppel: Appeal: Record.

1. Firemen being expressly included by the city charter of Superior (Laws of 1891, ch. 124, secs. 11, 21) among the appointive "officers" of the city, their salaries are governed by the provisions of sec. 15 of the charter, to the effect that every officer of the city, with certain exceptions, shall be paid an annual salary; that the common council in the month of March shall fix the salary of every such officer who may be elected or appointed during the ensuing year; and that the salary of an officer so fixed shall not be increased or diminished during his term of office.
2. The salary of a public officer is not a matter that can be fixed by contract, either before or after the term commences, but is an incident of the office, and the incumbent thereof has the same title to the salary that he has to the office.
3. Where the law prohibits a municipality from changing the compensation of an officer during his term of office, he will not be estopped, by signing an agreement to accept a less amount in consideration of being retained in office, and by accepting the amount so stipulated for his services, from recovering the balance of his legal salary.
4. To warrant this court in reversing a judgment which denies the right of an officer to recover as salary any sum in addition to what he had received and accepted, it must appear from the record what salary he was legally entitled to. And where the law required that his salary be fixed by the common council at a certain time, a showing that it was fixed by the council at another time is insufficient, such action of the council being illegal.

APPEAL from a judgment of the circuit court for Douglas county: JAMES O'NEILL, Judge. *Affirmed.*

Action to recover a balance said to be due plaintiff from defendant for services rendered as a fireman. The cause was tried by the court. The evidence disclosed, without dispute, the following:

From 1893 to May 1, 1897, plaintiff was a fireman for defendant city, by appointment by the common council thereof.

In February, 1896, such council passed an ordinance in form fixing the salaries of all officers and employees of the city for the ensuing year, that of plaintiff being named at $65 per month. September 29, 1896, the council, by resolution, determined to reduce the compensation of the employees in the police and fire departments of the city and to decrease the monthly pay roll of the fire department to $1,500 per month, either by reducing the rate of wages or the number of employees, or both. When the resolution was adopted, and as a part of the proceedings, the mayor of the city was requested to call before him all the men on the police force and in the fire department of the city and acquaint them with the nature of the resolution reducing their compensation and to request them to sign an agreement providing that in consideration of their further employment they would accept as full compensation for future services the wages fixed in accordance with said resolution. September 30, 1896, pursuant to such determination and request, the mayor called before him the policemen and firemen of the city, at which time plaintiff signed the following agreement:

"Whereas, the city of *Superior*, owing to the lack of money in its treasury, has found it necessary to curtail and lessen its expenses and for that purpose the common council of said city has, by resolution, passed September 29th, 1896, provided, among other things, that the monthly pay roll of the fire department of said city be reduced to $1,500 per month, said reduction to be effected by reducing the number of men employed in said department or the rate of wages paid, or both, and desiring to be continued in the employ of said city in said department; now, therefore, the undersigned severally and each for himself proposes and offers that in consideration of being retained in the service of said city in said department, I will accept and receive as full compensation for such services from and after October 1st, 1896, per month the sum set opposite my respective name. It being understood that my acceptance of the reduced rate of wages as herein provided does not insure my continued retention in such service or in any way affect the right of the mayor of said city to discharge me at any time."

The sum set opposite plaintiff's name was $42. Thereafter from and inclusive of October, 1896, to and inclusive of February, 1897, he received $42 per month, and for the two following months $60 per month.

On such facts the trial court decided that, notwithstanding the charter of the defendant required the common council, in the month of March each year, to fix the amount of salary incident to every city salaried office, whether elective or appointive, for the ensuing year, and prohibited such council from changing any salary so fixed for such year, plaintiff was not entitled to recover more than the amount he had received, because he was not an officer within the meaning of the charter, but was a mere employee; that his salary was legally reduced by the action of the common council on the 29th day of September, 1899; that he had no fixed term of office, and was subject to be discharged at the pleasure of the mayor, and that by signing and fully executing the agreement to receive $42 per month for his services as full compensation therefor, he was estopped from claiming any additional amount. Judgment was rendered pursuant to such decision, dismissing the action, and for costs in favor of defendant.

For the appellant the cause was submitted on the brief of *Crownhart & Foley.*

For the respondent there was a brief by *Archibald McKay* and *Geo. B. Hudnall,* and oral argument by *Mr. Hudnall.*

MARSHALL, J. Was appellant an officer of the city of *Superior* within the meaning of its charter, ch. 124, Laws of 1891? It seems to have been overlooked that such question must be tested by the charter, and that it was decided on general principles governing who is an officer and who an employee of a municipality. If the same line could be followed here, support could be easily found for the conclusion

of the trial court, but it cannot, since the charter unmistakably includes firemen among the appointive city officers. That appears by implication by sec. 9, and expressly by secs. 11 and 21.[1] By sec. 13, the term of all officers of the city is fixed at "one, two or three years respectively, as herein provided, and until their respective successors are elected or appointed and qualified." By sec. 11, the power of appointment of firemen is placed with the mayor, as is also the power of removal at his pleasure by sec. 21. Sec. 15 — following sec. 11 which recognizes firemen as officers, and sec. 13 fixing the term of office of all officers — provides that every officer of the city, except supervisors, aldermen, school commissioners, justices of the peace, and constables, shall be paid an annual salary, and that the common council, in the month of March, shall fix the amount of salary that shall be received by every city officer entitled to a salary, who may be elected or appointed in the city during the ensuing year, which salary shall not be increased or diminished during the term of office for which said officer may be elected or appointed.

The conclusion must follow that appellant was a city officer and entitled to the salary, regularly fixed, which was an incident to his office at the commencement of his term, unless his agreement to take a different salary concluded

[1] Sec. 9 provides that "the officers of the city shall be the mayor and two aldermen from each ward, constituting the common council, a treasurer, clerk," etc., etc., "and such other officers as the common council may deem necessary." Sec. 11 provides that the mayor, treasurer, etc., shall be elected by the people; that "the other officers shall be appointed by the mayor and confirmed" by the common council, "except watchmen, policemen and firemen, who shall take their appointment direct from the mayor without confirmation." Sec. 21 provides that "every officer elected or appointed to any office, except watchmen, policemen and firemen, may be removed from such office by a vote of three fourths of all the members of the common council; but no such officer, except watchmen, policemen and firemen, shall be removed without cause," etc.— REP.

him. The attempt of the common council to fix the salary in February instead of March, and to change it during appellant's term, was clearly usurpation of power and void.

The authorities are uniform to the effect that in the absence of authority conferred by statute the salary incident to an office cannot be legally changed during an officer's term, so as to compel him to take less than the salary incident thereto when he entered upon its duties. The salary to be paid to a public officer is not a matter to be fixed by contract, or that can be so fixed, either before or after the term commences. It is an incident of the office, and an incumbent thereof has the same title thereto as he has to the office. A municipality governed by a charter like that of respondent can no more make the salary of an officer a matter of contract than it can make the office itself such a matter. It cannot omit to elect a person to fill an office and then contract with some person to perform its duties. No one would claim that; yet it is just as plain that it cannot fill an office and make the compensation for performance of its duties a matter of contract. This court very recently passed upon the question involved. *Rettinghouse v. Ashland*, 106 Wis. 595. The authorities to that effect are numerous. The following are but a small part of them: *People ex rel. Satterlee v. Board of Police*, 75 N. Y. 38; *People ex rel. Ryan v. French*, 91 N. Y. 265; *Kehn v. State*, 93 N. Y. 291; *Clark v. State*, 142 N. Y. 101; *State ex rel. Kercheval v. Mayor of Nashville*, 15 Lea, 697; *Dyer v. U. S.* 20 Ct. Cl. 166; *Montague's Adm'r v. Massey*, 76 Va. 307; *Larew v. Newman*, 81 Cal. 588; *Scholfield v. U. S.* 32 Fed. Rep. 576; *Stocksdale v. U. S.* 39 Fed. Rep. 62; *Bowe v. St. Paul*, 70 Minn. 341.

Having reached the conclusion that appellant was a city officer and entitled to the salary incident to his office at the time his term commenced, the next question is, Did he estop himself by signing the contract, so called, and accepting the

amount stipulated therein for his services, from claiming any additional amount, notwithstanding it was less than his legal salary? There are authorities to sustain the affirmative of that proposition. *Hobbs v. Yonkers*, 102 N. Y. 13; *De Boest v. Gambell*, 35 Oreg. 368; *Brauer v. Portland*, 35 Oreg. 471; *McInery v. Galveston*, 58 Tex. 334; *O'Hara v. Park River*, 1 N. Dak. 279. The learned trial court seems to have been guided by those cases, but they hardly fit the facts of this case. In each there was an agreement between the municipality and the officer, to take less than the legal salary, made before he entered upon his term of office, or the legal salary was illegally reduced before he took possession of the office, and he received the same by express agreement afterwards. So if we were to approve the rule, that would not necessarily lead to a reversal in this case. It is one thing to agree with an officer before he enters upon his term of office, as to the compensation he shall receive, and quite another to hold over him, while in office, the menace of a removal therefrom unless he consents to a reduction of his legal salary, and by that means induce him to consent to such a reduction. It is difficult to see how such a proceeding could properly receive judicial indorsement. It is unnecessary to discuss here the mischiefs that might flow from such a system. That they are numerous and serious, as regards purity in municipal government, will occur to any sensible man of ordinary experience in public affairs, by a moment's reflection. That is sufficient to condemn, on grounds of public policy, in a court of justice, any attempt to invoke such a transaction to preclude an officer, forced to become a party thereto, from being bound thereby on the ground of estoppel. The foundation principle of estoppel is justice. Where there is no element of justice there can be no element of estoppel that can be enforced by the courts.

Independent of the foregoing, the better rule is that where the law, as in this case, prohibits a municipality from meddling, during an officer's term of office, with the compensation he shall receive for his services, the doctrine of estoppel cannot be invoked to thwart it; and that is the rule that has been adopted in this state. *Clarke v. Milwaukee Co.* 53 Wis. 65; *Rettinghouse v. Ashland*, 106 Wis. 595.

Notwithstanding the conclusions reached, there is yet an insuperable difficulty in granting appellant relief from the judgment appealed from. That grows out of the fact that we are not informed by the record as to what salary appellant was legally entitled to. We cannot infer that the salary fixed in February was either more or less than the salary incident to the office when appellant entered upon his duties, or that the amount he received is either more or less than the legal amount. We have no information on the subject. For aught that appears, while appellant was compelled to take less than $65 per month, he may have received more than the legal salary. It stands conceded that the action of the common council in February was illegal, as the charter expressly required the salary to be fixed in March preceding the commencement of the term. This situation is unfortunate for appellant if $42 per month is less than his legal salary, but it is a misfortune that this court is powerless to relieve him from. If there were a bill of exceptions showing what the legal salary was, or if there were a finding of fact on the subject, the situation would be different. As the case stands we must affirm the judgment.

By the Court.—The judgment is affirmed.

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IN RE COURT OF HONOR OF ILLINOIS.

March 1 — March 19, 1901.

Supreme court: Original jurisdiction, when exercised.

1. "The original jurisdiction of the supreme court extends to all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people."
2. If any given case satisfies the test above indicated, the court may exercise its jurisdiction or not as it sees fit, where the circuit court has concurrent jurisdiction.
3. In a case falling within the original jurisdiction of the court, the general rule is not to exercise it where the primary right to be vindicated is of a private nature, though the question involved is *publici juris*, and even though a state officer is a party.
4. No departure from the general rule indicated will be made unless the circumstances are of such an extraordinary character that adequate relief cannot be obtained by first resorting to the jurisdiction of the circuit court. Mere delay, or even irreparable loss to a private person, will not necessarily be deemed sufficient.

[Syllabus by MARSHALL, J.]

Application for the exercise of the original jurisdiction of this court to compel Emil Giljohan, commissioner of insurance of the state, to grant a license to the relator to do business in this state. The petition is to the following effect: The relator is a corporation duly organized under the laws of the state of Illinois as a fraternal beneficiary association. Its purposes are to furnish life endowment and pecuniary benefits to the beneficiaries of its deceased members, also accident and permanent indemnity to its members, and to encourage them in business and assist them in obtaining employment; also to promote benevolence and charity. The membership is confined to white persons. The jurisdiction of the corporation extends to and includes the state of Wisconsin. January 22, 1891, it applied to the commissioner of insurance of this state for a license under sec. 1955*e*, Stats. 1898, and complied with all the requirements

of the statute necessary to the granting of such application. The commissioner, though admitting that the application was in conformity to law, refused to grant the same solely upon the ground of relator's rate of assessment being too low to enable it to conduct a safe business. After such denial the commissioner proposed to reconsider the matter upon making an examination of the relator's affairs according to paragraph 241 of the Insurance Laws of Wis. [sec. 1968, Stats. 1898]. After such proposition was received by the relator and its attorney, it again demanded a license, which was refused for the same reason as before. The petitioner has made preparation to do business in this state, and its failure to obtain the necessary license is causing it irreparable damage. The application is made for the exercise of the original jurisdiction of the court because a resort to a circuit court would be attended by great delay. The question involved is purely one of law and is a question of general interest to the state.

An alternative writ of *mandamus* was prayed for.

H. W. Chynoweth, for the petitioner.

MARSHALL, J. The question presented for decision is, Should the original jurisdiction of this court be used where the primary right sought to be vindicated is private, even though a state officer is concerned as a party and the question involved is in some respects *publici juris?* The general limits of the original jurisdiction of the court were declared in *Attorney General v. Railway Cos.* 35 Wis. 425, thus: "It extends to all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." "*Quod ad statum reipublicæ pertinet.*" That doctrine, since declared, has been rigidly adhered to as being strictly in accord with the intent of the framers of the constitution. *State ex rel. Drake v. Doyle*, 40 Wis. 175; *State ex rel. Cash v. Sup'rs of Juneau Co.* 38 Wis. 554; *State*

v. St. Croix Boom Corp. 60 Wis. 565; *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 444; *State ex rel. Radl v. Shaughnessey*, 86 Wis. 646; *State ex rel. Fourth Nat. Bank v. Johnson*, 103 Wis. 591. The rule for measuring the original jurisdiction of the court was so exhaustively and ably discussed by the learned chief justice who wrote the opinion in *Attorney General v. Railway Cos., supra*, that no one since that time has ventured to enlarge upon what was there said. As a statement of premises, clear demonstration of the correctness thereof, and deduction of an indisputable conclusion, the opinion of the learned chief justice has always challenged and readily received the admiration of the judiciary and the profession, and will continue to do so.

The test of when a given case comes within the limits stated, of the original jurisdiction of the court, is not whether the wrong sought to be redressed is a proper subject for the use of one of the writs mentioned in the constitution, for in respect to such jurisdiction, while the writs are given not in aid of but for jurisdiction, it does not extend to all cases where one of such writs or the Code substitute therefor is proper, but stops at the limits of the prerogatives of sovereignty. It follows that if the question involved comes within the limits of the court's original jurisdiction as it has been defined, then and then only does judicial power to use one of the prerogative writs in the exercise of it follow. So every case is to be decided, not by the scope of any particular writ. The test is, Does the wrong to be redressed affect the sovereignty of the state, its franchises or prerogatives, or the liberties of its people? If we pass that test, the rest involves mere means of exercising jurisdiction or judicial discretion as to whether the jurisdiction ought to be used under the circumstances of the given case.

Coming to the question of whether controlling a state officer in the performance of his legal duties, where the right to be vindicated is purely private, though the question

is *publici juris*, is within the jurisdictional limits stated, we find that the previous holdings of the court do not furnish a definite guide in a case exactly like this. The precise question on the precise facts does not appear to have been discussed or decided, though it has many times been discussed and decided in principle. Jurisdiction was assumed in *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 667. No question of judicial power, however, was raised by counsel or referred to in the opinion of the court. In *State ex rel. Drake v. Doyle*, 40 Wis. 175, the proceeding was to compel the revocation of a license which it was claimed the secretary of state, in defiance of a positive statute, had refused to revoke. Jurisdiction was taken upon the ground that the judicial question affected the whole state in one of its prerogatives, that is, its right to say when a foreign corporation should be privileged to do business in this state, and that so far as it involved a private right such right was secondary to the main object of the suit. The doctrine of the decision is that if in any given situation (the *quod ad statum reipublicæ pertinet*) the effect upon the prerogatives of the state, its privileges or franchises, or the effect upon the liberties of its people, is involved, supreme jurisdiction exists, whether the wrong calling for redress be merely private, or private and public, or purely public. While the fact that the chief or the only purpose is to vindicate a private right does not militate against the jurisdiction of the court, the question of whether it ought to allow the use of its jurisdiction in the particular instance, or in a particular class of cases, is thereby affected. The mere presence of a private relator having a special interest neither gives, nor his dropping out, having once entered the arena, takes away, jurisdiction. The court being once in possession of the litigation within its original jurisdiction, whether set in motion by a private relator or without any relator, it may proceed to vindicate the public right involved, notwithstanding the private interest disappears.

The next question is, Ought the court to lend its jurisdiction in a case like this,— one in which the wrong to be redressed, if any there be, is of a private nature, though it comes within the general limitation of the court's original jurisdiction. On that, if we follow cases where the question has been considered and decided, ignoring the recent case of *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 667, as a precedent, where, as above stated, no question of jurisdiction was considered, there is no difficulty. "It is well settled," says RYAN, C. J., in *State ex rel. Drake v. Doyle*, 40 Wis. 175, "that so far as the private right of a relator is concerned this court will not take jurisdiction." Further, it was said, in effect, while the writ may go on the relation of a private individual and involve a private right, where a public and private right meet, the jurisdiction will be called into activity for the public right primarily, though the private right may be incidentally vindicated. So it seems that where, if there is a public right, it is merely incidentally affected, and the real subject of the writ, if issued, will be to redress a private wrong, though necessarily in the name of the state and possibly against an administrative or other officer thereof, the moving party should be sent to the circuit court as the most appropriate tribunal to hear his complaint in the first instance. That was the rule announced, in the main, as early as *State ex rel. Board of Education v. Haben*, 22 Wis. 101. That case, in principle, covers the question here for decision, though the purpose thereof was to reach a local officer. It was followed by *State ex rel. Cash v. Sup'rs of Juneau Co.* 38 Wis. 554. This court took jurisdiction in *State ex rel. Raymer v. Cunningham*, 82 Wis. 39, where the right of the state superintendent of public instruction to compensation for expenses in addition to his salary pursuant to an act of the legislature, was involved, but that was in harmony with previous decisions of the court. The primary right was of a public character. The

people of the whole state were interested. The same was true in *State ex rel. Att'y Gen. v. Cunningham*, 81 Wis. 440, and *State ex rel. Lamb v. Cunningham*, 83 Wis. 90. The jurisdiction of the court was invoked in both of those cases by a private relator who had no greater interest in the question involved than any other citizen of the state, but such question was one solely of public interest.

In *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 667, as before indicated, the primary right involved was private. In harmony with previous decisions of the court as to the use of its original jurisdiction, it might well have declined to entertain the case. The jurisdiction of the circuit court was ample and no special reason was given for not resorting to that tribunal, other than might have been given in almost any case, or other than is given in this case. Mere delay, or even irreparable loss to a private party, is not necessarily sufficient to warrant this court, whose chief function is appellate jurisdiction,— in which field there is ample opportunity for the exercise of all its industry,— in opening the door of its original jurisdiction. Otherwise that door would be swung so often as to necessarily interfere with the efficient performance of the duties of the court in its principal field of labor. That has been the idea entertained here since *State ex rel. Covenant M. B. Asso. v. Root* was decided, though it has not been promulgated by legal opinions or by any rule of court, so as to bring it sufficiently to the attention of the profession to prevent frequent applications for prerogative writs to secure mere private rights. There have been many of such applications in recent years, but they have been uniformly denied. It would require considerable labor to cite all the instances where that has occurred, but the following are sufficiently significant to emphasize what has been said: *In re Guarantors Liability & Indemnity Co.*, application for writ of *mandamus* to compel the commissioner of insurance to cancel the revocation of a license,

denied October 17, 1896. Court Journal B2, p. 390. *State ex rel. Fidelity & C. Co. v. Fricke*, application for writ of *mandamus* under circumstances similar in principle to those in the above case, denied March 28, 1898. Court Journal C2, p. 431.[1]

It is believed that the position of the court as above indicated is in strict harmony with the intent of the constitution in conferring upon it original jurisdiction extending to matters that are also placed within the jurisdiction of circuit courts. The jurisdiction of the latter was intended to be first exhausted, except in instances where, in the judgment of this court, the interests involved might be deemed to be of such supreme importance or in such immediate serious danger, as to call upon it to rest from its ordinary jurisdiction to give room for the exercise of its extraordinary power, rather than that such interest should suffer by delay. Obviously, in this view, the court must be governed, in a great measure, as to when and when not to allow its original jurisdiction to be called into activity, by the amount of its ordinary business. That was declared in 1867, in the case to which we have already referred. *State ex rel. Board of Education v. Haben*, 22 Wis. 101. It was there said, in effect, the court will not take jurisdiction in a case against a local officer where the circuit court has concurrent jurisdiction, in the absence of special circumstances requiring it. The court said further, "Considering the onerous duties necessarily devolving upon the members of this court, we do not feel like encouraging the bringing of causes here which can quite as well be attended to in the circuit courts. . . . Whenever there is anything in the application which shows that it would be unavailing if made at the proper circuit, or where, from the nature of the question involved, it would seem necessary and proper that the suit be commenced in

[1] In neither of these cases was any opinion filed upon denying the application.—REP.

the supreme court, jurisdiction will be entertained. Otherwise it will not be, but parties will be required to make their application to the circuit court." Since that was said the labor of this court has been more than trebled, which, as it seems, not only warrants extending, but demands the extension of, the rule announced, so as to generally exclude from original jurisdiction here cases where the state or one of its officers is directly interested as a party, if the purpose of the application is to redress a mere private wrong, and to require extraordinary circumstances as to any of the excluded class of cases to justify making an exception to such rule.

By the Court.— The application is denied.

GRIMSRUD, Appellant, vs. LINLEY, Garnishee, Respondent.

March 1 — March 19, 1901.

Garnishment: Notes in hands of attorney: Attorney's lien: Justices' courts: Statutes construed.

Under secs. 3725, 3727, and 2769, Stats. 1898, a justice may require a garnishee to deliver property to him only when it is found that, at that time or some other fixed date, the defendant is or will be absolutely entitled to the property. Notes and a mortgage in the hands of an attorney for collection, upon which he has a lien for services rendered, are therefore not subject to garnishment in justice's court.

APPEAL from a judgment of the superior court of Douglas county: CHARLES SMITH, Judge. *Affirmed.*

Plaintiff commenced an action in the municipal court against the defendant Anderson, and summoned *Victor Linley* as garnishee. The latter answered that he was an attorney, and that he had in his possession, belonging to defendant, thirteen notes, and a mortgage to secure them on certain real estate, which were placed in his hands to bring a suit

to reform the mortgage, and to collect the notes as they became due; that in pursuance of his retainer, and before the service of the garnishee process, he had performed work reasonably worth $25, and since such service he had commenced a suit to reform said mortgage, and that his services in that respect were worth $25, and he had incurred expenses in connection therewith amounting to $5; that he claimed a lien for such services upon said papers, and for the further sum of $10 for other services rendered for defendant; that the continued possession of said papers was necessary to carry out the purposes of his employment and until its purposes were attained, and he claimed the right to retain the possession thereof pursuant to his employment and for the protection of his lien. No issue was taken upon such answer. Thereafter the municipal judge made an order requiring the garnishee to deliver such papers to him within ten days. The garnishee appealed therefrom to the superior court, where the case was heard on the original papers. Judgment was entered reversing the order of the municipal court and discharging the garnishee from liability. From that judgment plaintiff has brought this appeal.

The cause was submitted for the appellant on a brief signed by *E. A. Eckman* and *W. P. Crawford*, and for the respondent on the brief of *V. Linley*.

BARDEEN, J. This case must be determined under the law relating to the liability of garnishees as applicable to proceedings in justice's court. Sec. 3725, Stats. 1898, provides that when the answer of the garnishee discloses that he had property in his possession belonging to the defendant, the justice shall enter an order in his docket requiring the garnishee, within ten days, to deliver to him such property or so much thereof as shall be sufficient to satisfy the judgment and costs and the costs of the garnishee proceeding, and all such property may be ordered to be sold on

execution against the defendant. Sec. 3727 provides that no judgment shall be rendered against the garnishee, or any money or property required to be so delivered, upon any liability arising out of either of the causes mentioned in sec. 2769. This section provides that no judgment shall be rendered upon a liability of the garnishee, among other things, arising "by reason of any money or other thing owing from him to the defendant, unless, before judgment against the defendant, it shall have become due absolutely and without depending on any future contingency."

It is frankly admitted by plaintiff's counsel that the order of the municipal judge was wrong, and that the garnishee's lien could not be cut off by the garnishment proceedings. Their argument is that, notwithstanding such lien, the defendant has yet such an interest in the notes and mortgage as may be secured by garnishment. Just *how* that is to be secured and worked out is not disclosed. Proceeding by garnishment is wholly statutory. Its provisions must be reasonably construed, not only to effect the purposes declared, but also to protect the rights of all concerned. It must be conceded that the garnishee, by virtue of his lien as attorney, was entitled to retain possession of the defendant's notes and mortgages. Without such possession, his lien would become worthless. He may retain such possession as against all the world, until his lien has been satisfied. Sec. 3725 makes no provision for any such condition of things. It must be construed to mean that the magistrate is only to order delivery of the property in the hands of the garnishee when it is found that, at that time or some other fixed date, the defendant is or will be absolutely entitled to same. This construction is in harmony with sec. 2769, above referred to, which prevents a judgment against the garnishee unless it is determined that the thing owing from the garnishee belongs absolutely to the defendant before judgment against him, and is not dependent upon any future contingency.

The defendant's right to this property was dependent upon the condition that he pay the attorney's lien and charges. This might never take place. There being no provision of law which would enable the creditor to secure the debtor's interest in garnishment proceedings, he was left to his other legal remedies. Probably plaintiff might have secured defendant's interest in the property by levy and sale on execution, under sec. 2988, but he could not secure it in proceedings by way of garnishment. Sec. 3719, which says that, from time of service, the garnishee shall stand liable to the plaintiff for all money, credits, and effects in his hands belonging to the defendant, must be construed to mean that he is liable only for such money, credits, or effects as the other provisions of the statute make garnishable in his hands. The case of *McCown v. Russell*, 84 Wis. 122, has no application to the facts in this case.

By the Court.—The judgment of the superior court of Douglas county is affirmed.

ALLEN and others, Respondents, vs. COE, Intervener, Appellant.

March 1—March 19, 1901.

Land contract: Foreclosure: Judgment by default: Conditions of redemption: Intervention: New trial: Discretion: Appeal.

1. In an action to foreclose a land contract, judgment by default was entered adjudging a foreclosure in case the defendant failed to pay the amount due, including taxes, etc., and also the value of improvements made by a subsequent purchaser from the vendor. Thereafter an assignee of the defendant intervened and asked that the provision as to payment for improvements be stricken from the judgment and that he have such other relief as might be equitable. *Held*, that it was within the discretion of the court to set aside the judgment entirely and grant a new trial, with leave to

the plaintiffs to amend their complaint in respect to the improvements.

2. A judgment granting foreclosure of a land contract only in case the defendant failed to comply with certain conditions, among which was the payment for improvements made by a subsequent grantee of the vendor, does not grant relief in excess of the prayer of the complaint that defendant be entirely excluded from any interest in the land, and that plaintiff's title be quieted.

3. An order granting a new trial being one from which an appeal is expressly given by subd. 3, sec. 3069, Stats. 1898, the supreme court will not dismiss the appeal if there was no abuse of discretion, but will affirm the order.

APPEAL from an order of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Affirmed.*

The complaint in this action, verified in October, 1899, set forth the making of a land contract from the plaintiff *John G. Allen* to the defendant Gust Carlson in May, 1892, for the sale of eighty acres of land, at the price of $680, payable $120 cash, and $140 and interest on the 1st of each January thereafter, of which a total of $279.60 had been paid on and prior to December 29, 1892; that the defendant Carlson had improved the land only to the extent of a log house worth less than $50, and had appropriated to himself $400 worth of timber from the land; that he had failed to pay taxes, and plaintiff had been obliged to pay them,—about $86; that in November, 1895, the defendant abandoned the land, and relinquished all his rights under the contract and money paid on account thereof, and notified the plaintiff *Allen* thereof; that plaintiff *Allen*, relying thereon, had on December 20, 1897, sold the land by warranty deed to the other plaintiff *Woodcock*, and received payments therefor, and that *Woodcock* had gone into the occupation and possession; that in March, 1899, Carlson set up some pretense or claim under the contract, which contract, being recorded, constituted a cloud on the title. The prayer was that Carlson, and all persons claiming

under him, be forever barred and foreclosed from all rights in the premises, and be adjudged to release to the plaintiffs all claim thereto. Judgment was entered on default as upon an ordinary land contract, adjudging a foreclosure *nisi*, on condition that the defendant fail for thirty days to pay the plaintiff the balance due on the contract and the amounts paid for taxes, and fail within a time thereafter to be fixed by the court to pay the value of improvements made upon the land by *Woodcock*, the amount to be ascertained on reference.

At the same term of court, one *Arthur E. Coe*, representing himself to be the assignee of Gust Carlson's rights under said land contract by assignment dated November 30, 1899, applied to the court for leave to intervene in said action, and to redeem from said judgment, and to have said judgment amended by striking therefrom the provision with reference to the payment for improvements made by *Woodcock*, the same not being alleged in the complaint, "and that your petitioner have such further judgment, order, or relief as may be just and equitable in the premises." To this application the plaintiffs presented objection or verified answer, in which there was alleged the inadvertent omission from the complaint of the allegation with reference to *Woodcock's* improvements, the fact that they amounted to some $400, and that *Woodcock* was in actual ignorance of any rights of Carlson or any other person in the property, and prayed alternative modification of the relief asked by *Coe*, to the effect that they be permitted to amend their pleadings and the judgment be left to stand, or that an issue be made up between the parties and trial had as to whether payment for such improvements should be a condition of redemption.

The court made an order setting aside the judgment entirely, making *Coe* a defendant, permitting plaintiffs to make such amendment of the complaint as they chose relative to improvements made on the land since the abandonment

thereof by the defendant and as to the defendant's liability, and requiring service of such amended complaint on *Coe* within twenty days, no costs to either party. From this order *Coe* appeals.

Clarence C. Coe, for the appellant.

For the respondents the cause was submitted on the brief of *Harold Harris* and *W. N. Fuller*.

DODGE, J. The order made seems to be entirely within the discretion of the court. *Coe* applied for a modification of the judgment and such other relief as might be equitable. Plaintiffs urged their equitable rights, and the propriety of protecting them as a condition of granting to *Coe* the favor which he was asking of the court, and to which he had no absolute right after a complete default. In granting that favor, the court might properly have imposed any reasonable conditions which would protect the equities of the plaintiffs. The setting aside of the judgment, and giving both parties opportunity for a trial upon their rights, was a legitimate method for protecting such equities. One of appellant's principal contentions is that the judgment was erroneous, and that he had a strict right to have eliminated from it that error, to wit, the requirement of payment for improvements as a condition of redemption, no such improvements being alleged in the complaint. He invokes the rule that upon default the judgment cannot exceed the demand of the complaint. Examination of the complaint discloses that the relief granted by the judgment was within, rather than in excess of, that demand. The relief prayed was the entire exclusion of Carlson and his assigns from any interest in the land, partly on the ground that by his declaration and laches, and by reason of the plaintiff's acts in reliance thereon, any claim by him had become inequitable. The judgment, instead of granting the full relief of complete foreclosure and bar of Carlson and quieting title in

plaintiffs, awarded only that result upon certain conditions; it gave to the plaintiffs and took from the defendant less than the complaint demanded.

Being within the field of the court's discretion, we cannot consider such discretion to have been abused. Plaintiffs' equities, as apparent from the complaint and from the showing on the motion, were most persuasive, and invited the most careful attention of the court. The full and complete protection thereof by imposing upon the applicant, *Coe*, merely the condition of trying the rights of the respective parties, and that, too, without terms imposed upon him, was certainly liberal enough.

This order granting a new trial is one of those from which, by express designation, an appeal is given. Subd. 3, sec. 3069, Stats. 1898. On finding no abuse of discretion, we should affirm, instead of dismissing appeal. It is governed by the same rule as an order granting, refusing, or modifying an injunction. *McElroy v. Minn. P. H. Co.*, *ante*, p. 116.

By the Court.— Order affirmed.

ROCKMAN, Respondent, vs. ACKERMAN, imp., Appellant.

109 639
d116 243

March 1 — March 19, 1901.

Service by publication: Affidavit: Time of making: Jurisdiction: Mailing prior to order: Judgment by default: Proof of service: Waiver of lack of jurisdiction: Appeal: Undertaking.

1. Where service of summons was attempted to be made by publication, the fact that the order for publication was not made until twenty-five days after the making of the affidavit therefor shows that the court was without jurisdiction.
2. In order that the court may acquire jurisdiction by the service of summons by publication under secs. 2639, 2640, Stats. 1898, copies of

the summons and complaint must be mailed to the defendants *in pursuance of the order of the court*, and a mailing before the order was made is insufficient.

3. A judgment by default should not be entered without proof of the service of the summons being of record.

4. Want of jurisdiction to enter a judgment by default is not waived by the appearance of defendant solely for the purpose of appealing.

5. An undertaking on appeal from a judgment of foreclosure is *held* sufficient to give this court jurisdiction, although the plaintiff's name was omitted from the blank for the respondent, and the wrong defendant was named as mortgagor; and appellant was allowed, on the argument in this court, to file an amended undertaking.

APPEAL from a judgment of the circuit court for Barron county: A. J. VINJE, Circuit Judge. *Reversed.*

Clarence C. Coe, for the appellant.

For the respondent the cause was submitted on the brief of *J. F. Ellis.*

CASSODAY, C. J. This is an action to foreclose a note for $48 secured by a mortgage on real estate in Barron county, Wisconsin, both executed by the defendant *George Ackerman* January 24, 1894, and subsequently assigned to the plaintiff. Judgment was entered thereon by default May 7, 1900. No attempt was made to serve the summons on any of the four defendants, except by publication. The summons and complaint were filed February 12, 1900. Twenty days prior to that time the attorney for the plaintiff made an affidavit to the effect that he was unable, with due diligence, to make service of the summons upon the four defendants named, and stated that the post-office address of *Ackerman* was at St. Paul, Minnesota, and of the three other defendants at Chicago, and asked that service of the summons should be made by publication. That affidavit was not filed with the clerk until seven days after the entry of the judgment. Another affidavit of the same attorney was made February 5, 1900, to the effect that February 2, 1900, he

mailed copies of the summons and complaint to *Ackerman*, at St. Paul, and also to the defendant Albert Schonbeck, at Chicago. That affidavit was not filed with the clerk until seven days after the entry of the judgment. Twenty-five days after the making of the affidavit for publication, and fifteen days after mailing such copies of the summons and complaint, and five days after the filing of the summons and complaint with the clerk, to wit, February 17, 1900, the plaintiff obtained an order of publication, directing, in effect, that on or before the first publication of the summons the plaintiff should mail to the respective defendants, at their post-office addresses, copies of the summons and complaint. That order was not filed until seven days after the entry of the judgment. February 24, 1900, the plaintiff's attorney made an affidavit to the effect that on February 22, 1900, he had mailed copies of the summons and complaint to the defendants Allen and wife, at Chicago. That affidavit was not filed until seven days after the entry of the judgment. The publication of the summons was commenced February 23, 1900, and ended March 30, 1900. The affidavit of such publication was made April 2, 1900, but was not filed until seven days after the entry of the judgment. The affidavit of the plaintiff's attorney that none of the defendants were infants, and that none of them had answered or demurred or appeared in the case, but that all were in default, was made May 7, 1900, but was not filed until seven days after the entry of the judgment. The notice of *lis pendens* appears to have been filed seventeen days before the filing of the summons and complaint, but no proof of such filing was filed in the clerk's office until seven days after the entry of the judgment. The judgment was entered May 7, 1900. June 4, 1900, the defendant *Ackerman* appeared by his attorney solely for the purpose of appealing from the judgment, and thereupon did appeal therefrom.

The deformity of this record is not only inexcusable but,

so far as we now remember, without a precedent. We shall not attempt to state all the grounds for reversing the judgment. The fact that the order of publication was not made until twenty-five days after the making of the affidavit for publication is of itself enough to show that the trial court was without jurisdiction. *Roosevelt v. Land & River Co.* 108 Wis. 653. It does not appear from such affidavit nor from the complaint that any of the defendants were nonresidents, nor that the residences of any of them were unknown. Sec. 2639, Stats. 1898. And it does appear from the complaint that *Ackerman* was of Clinton, Barron county, Wisconsin, when the mortgage was given; and the affidavit of default states that all the defendants reside in Chicago. The section of the statute cited provides that the "service of the summons may be made without the state or by publication upon a defendant," in the cases therein specified, "*on obtaining an order therefor* as provided in" sec. 2640, Stats. 1898. That section provides that "the order shall direct that service of the summons be made" as therein designated, "and that *on or before* the day of the first publication" the plaintiff shall mail copies of the summons and complaint as therein prescribed. The order in question did so provide. But, as indicated in the statement of facts, none of such copies was mailed to any of the defendants *in pursuance of that order*, except to Allen and wife. On the contrary, they were mailed to the other two defendants, including *Ackerman*, fifteen days before the order was made, and ten days before the summons and complaint were filed. No such judgment should be entered on default without proof of the service of the summons being of record.

Counsel for the plaintiff contends that *Ackerman* waived the question of jurisdiction by his attorney appearing "solely for the purpose of appealing from the judgment." This court has recently held that a general appeal from a

judgment of foreclosure of a mortgage, taken by default, does not waive the want of jurisdiction of the court to enter the judgment. *Zimmerman v. Gerdes*, 106 Wis. 608. Certainly such an appearance did not give jurisdiction over the subject matter of the action.

Counsel for the plaintiff claims that the undertaking on this appeal is insufficient to be effectual for any purpose. It is in the sum of $250, but the plaintiff's name is omitted from the blank for the respondent, and Albert Schonbeck is mentioned as mortgagor, instead of *Ackerman*. But we think it was sufficient to give this court jurisdiction, and hence the appellant was properly allowed to file a new and amended undertaking on the argument, under sec. 3068, Stats. 1898. *Stolze v. Manitowoc T. Co.* 100 Wis. 212, 213.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for further proceedings according to law.

NICHOLS, Assignee, Appellant, vs. CITY OF SUPERIOR, Respondent.

109 643
f110 1401

March 1 — March 19, 1901.

(1) *Appeal: Record: Exceptions.* (2) *Municipal corporations: Contracts for improvements: Abandonment: Completion of work by city: Offsets.*

1. A recital in a bill of exceptions that the court "filed its findings and conclusions of law, to which findings and conclusions of law the plaintiff has filed his several exceptions which are made part of the record," is *held* insufficient to identify and incorporate into the bill of exceptions a paper purporting to contain exceptions to said findings, which was filed with the clerk and returned with the record but was not actually inserted in the bill.

2. A contract with a city to construct certain improvements for specified amounts provided that payments should be made on estimates as the work progressed; that the work should be completed at speci-

fied dates; that liquidated damages at a fixed sum per day should be paid in case of noncompletion at such times; and that in case the work was not prosecuted with diligence the city might complete the same or relet it and charge the cost to the contractors. The contractors, after prosecuting the work for a time, abandoned it, certain sums being still owing them for work actually done. The city thereupon completed the work, necessarily expending certain sums in excess of the contract price, the aggregate of which was greater than the amount due the contractors. *Held*, that such sums, as well as the liquidated damages for noncompletion of the work, were proper offsets against the claim of the contractors.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

This action was brought to recover about $17,000 for labor performed and materials furnished by the firm of Forrestal Bros. in the construction of certain sewers and city improvements in the city of *Superior*, under the terms of several contracts with the city, the claims having been assigned by Forrestal Bros. to the Bank of West Superior, of which bank the plaintiff is the assignee under a voluntary assignment. A counterclaim for damages for not completing the work was interposed by the city. The case was tried by the court, and findings of fact made in substance as follows:

(1) That in the year 1890 the firm of Forrestal Bros. made five separate contracts with the city of *Superior*, known as Nos. 19, 30, 33, 34, and 38, respectively, for the construction of certain city improvements in said city at certain prices. (2) That each of said contracts contained a provision to the effect that, if the work was not prosecuted with diligence, the board of public works of the city might suspend the same and relet the work to some other competent party, or employ men and buy material for the completion of the same, and charge the cost thereof to the contractors; and also provided that, in case of the noncompletion of the work on a certain time fixed in the contract, the contractors should pay

to the city certain sums per day as liquidated damages. (3) That payments upon the contracts were to be made upon periodical estimates, reserving, however, twenty-five per cent. until the final completion of the work, and that no claims for additional work beyond the contract price should be allowed unless ordered in writing by the city engineer. (4) That, as to contract No. 19, the contractors performed work thereunder amounting to $16,367, and the city paid to them thereon $15,548.65; and afterwards paid the sum of $92.25 in completing the work as left by the contractors; that the city engineer issued an estimate for extra work in the amount of $1,881.15, but that the said work was not directed in writing. (5) That, as to contract No. 30, the contractors performed work thereunder amounting to $11,205, and the city paid thereon the sum of $4,383.19, and thereafter necessarily expended in completing the work the sum of $19,878.12; the entire sum thus paid by the city being $5,982.69 less than the contract price. (6) That, as to contract No. 33, the contractors performed work thereunder amounting to $13,077.40, and were paid $6,938.03, and the city thereafter necessarily expended in completing the work $22,823.99; making the total paid out by the city $29,762.02, or $29.63 less than the contract price. (7) That, as to contract No. 34, the contractors performed work amounting to $8,276.66, and were paid $3,161.18, and the city thereafter expended in completing said work $34,333.56; making $8,924.64 paid out by the city more than the contract price. (8) That, as to contract No. 38, the contractors were paid $267.75 for labor performed by them, and that the city afterwards completed said contract, and necessarily expended $39,884.64 in so doing, and that the total amount paid out by the city was $3,082.38 more than the contract price. (9) That on the 24th of September, 1890, the Forrestal Brothers assigned by instrument in writing all their credits of every nature and assets in the county of Douglas, Wisconsin,

to the Bank of West Superior, and gave said bank an order upon the comptroller of the city for all money due or to become due them upon said contracts, but that the board of public works of the city never consented, in writing or otherwise, to said assignment. (10) That the Bank of West Superior made no claim, and did not inform the city of the fact that it had any claim, against it until September 12, 1896. (11) That on the 25th of September, 1890, the Forrestal Brothers abandoned all of their said contracts, without fault on the part of the city, and that the city then went on and completed the same. (12) That the liquidated damages for failure to complete said contracts within the time stipulated therein amounted to $3,350, no part of which has been paid. (13) That the aggregate amount expended by the city in completing said contracts over and above the contract price, together with the liquidated damages aforesaid, is $15,449.27, and that the said sum is a proper offset against the amounts due the contractors for work actually done, and exceeds such amount.

Upon these findings, judgment was ordered dismissing the complaint. A paper is returned with the record purporting to contain exceptions by the plaintiff to certain of the findings, but the same are not incorporated in the bill of exceptions. Judgment was rendered for the defendant, and the plaintiff appeals.

George P. Knowles, for the appellant, contended, *inter alia*, that the only damages recoverable under the contract were the liquidated damages specified therein. Hale, Damages, 123–126; *Welch v. McDonald*, 85 Va. 500; *Hathaway v. Lynn*, 75 Wis. 186; *Pettis v. Bloomer*, 21 How. Pr. 317; *Hall v. Crowley*, 5 Allen, 304; *Sanford v. First Nat. Bank*, 94 Iowa, 680; *Kemp v. Knickerbocker I. Co.* 69 N. Y. 45.

For the respondent there was a brief by *Archibald McKay* and *Geo. B. Hudnall*, and oral argument by *Mr. Hudnall.*

WINSLOW, J. In order to entitle this court to review findings of fact of the trial court, it is absolutely essential that exceptions thereto be incorporated in the bill of exceptions. This proposition has been so frequently announced that it seems like an affectation of learning to cite authorities. Stats. 1898, sec. 2870; *Cramer v. Hanaford*, 53 Wis. 85; *Lederer v. Estate of Kohn*, 100 Wis. 662. Nor will a paper purporting to contain exceptions, filed with the clerk and returned with the record but not incorporated in the bill, answer the purpose. *Newton v. Williams*, 94 Wis. 222. In the present case there is such a paper returned with the record, but it is not inserted in the bill, nor was it identified in any manner so that it can be said to have been incorporated therein. The only reference contained in the bill to any exceptions to the findings is the following recital immediately preceding the certificate: "The court thereupon filed its findings and conclusions of law, to which findings and conclusions of law the plaintiff has filed his several exceptions, which are made part of the record, and rendered judgment in favor of the defendant for its costs and disbursements." This recital is plainly insufficient. It does not purport to make such exceptions part of the bill, nor does it even attach or describe them so that they can be with any certainty identified.

The only question presented, therefore, is whether the pleadings and findings sustain the judgment. It cannot be doubted that they do sustain it. The Forrestals contracted to construct certain city improvements for certain sums, payments to be made on estimates as the work progressed; the work to be completed at specified dates, liquidated damages at so much per day to be paid in case of noncompletion at the specified time; the board of public works having the right, in case the work was not prosecuted with diligence, to relet the same to other parties, or employ men and purchase material, and complete the same, and

charge the cost to the contractors. After prosecuting the work for a time, and receiving certain payments on estimates, they abandoned their contracts, certain sums being still owing them for work actually done. The board of public works completed the work partly by men in their employ and partly by contract, and in so doing necessarily expended certain sums in excess of the contract prices, the aggregate of which sums was greater than the sums still due the Forrestals for the work actually done by them. Under the contracts these sums, as well as the amounts of liquidated damages for the noncompletion of the work in the stipulated time, were proper offsets to the claims of the Forrestals. Soon after the abandonment of the work, the Forrestals assigned their claims against the city to the Bank of West Superior, but no notice of such assignment was given to the city until September, 1896, when its offsets had accrued. These facts are not open to dispute, and they demonstrate the correctness of the judgment.

By the Court.—Judgment affirmed.

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109 648
113 8 55

BANK OF COMMERCE, Appellant, vs. ELLIOTT, Respondent.
SAME, Appellant, vs. ELLIOTT and another, Respondents.
SAME, Appellant, vs. SAME, Respondents.

March 2—March 19, 1901.

Bankruptcy: Actions pending in state courts: Intervention of trustee: Jurisdiction: Discontinuance: Pleading discharge: Enforcement of liens: Garnishment: Costs: Appeal: Orders subsequent to judgment.

1. An order having been made in bankruptcy proceedings in the federal court, directing the trustee under sec. 11b of the bankrupt act to intervene in a suit pending in a state court to which the bankrupt is a party, the latter court will be governed, in deciding an application to permit such intervention, by state laws and judicial policy.

2. If such an application to intervene is denied, only a party actually aggrieved by the adverse decision can be heard on appeal therefrom; and the trustee cannot be so heard unless he shall have first applied to the state court, failed in his application, and appealed specially from the decision.

3. A discharge of a debtor in bankruptcy does not extinguish for all purposes a debt upon which it operates, so as to displace the jurisdiction of the state court in a pending action to enforce it. Notwithstanding the discharge, the cause of action to recover the debt continues, unless the bankrupt insists upon his discharge by pleading it in bar of further proceedings in the suit.

4. If a person is discharged from his debts in bankruptcy, pending a suit against him to recover a debt upon which such discharge operates:

(a) The plaintiff, by leave of court, and before answer setting up the discharge, may discontinue the action without costs, and will generally be permitted to do so;

(b) The suit may proceed to judgment notwithstanding the discharge, if the defendant does not, by a proper proceeding, insist upon it as a defense;

(c) Upon the defendant applying to the court for leave to plead his discharge in bankruptcy, the court may, as terms of granting such application, require a waiver of any costs up to the time of setting up the new defense;

(d) The right to plead the discharge in bankruptcy may be waived by unreasonable delay to the plaintiff's prejudice or by answering without setting up the discharge;

(e) If the defendant pleads his discharge as a defense to the plaintiff's claim, no terms being imposed, the cause will then stand for trial like any other. If the defendant recovers he will be entitled to costs the same as in other cases, and plaintiff will be entitled to costs if he recovers.

5. If a debt is discharged in bankruptcy pending an action in the state court to recover the same, and there is a lien created by law incident to such debt, a plea in bar of further proceedings in the case will not preclude the court from rendering such a judgment as may be necessary to enable the plaintiff to enforce the lien, if, notwithstanding the discharge, it is preserved by the bankrupt act.

6. The interest which the plaintiff in a garnishee action obtains in the property or credits of the defendant, by the due service of a garnishee process upon the person liable to such defendant as a debtor or custodian of his property, is a lien created by law within the meaning of the bankrupt act, and an action pending to recover an

indebtedness which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive the discharge and defense on that ground, so far as to permit a judgment in form against the defendant, enforceable as to the equitable lien secured in the garnishee action.

7. The defendant in an action to which a garnishee action is incident, in which issue has been joined, is a joint defendant with the garnishee in the latter action, and under circumstances coming within the last clause of sec. 2772, Stats. 1898, a judgment for costs may be rendered in favor of the two jointly.

8. Where a cause or action, existing at the time an action was commenced to enforce it, has been fully extinguished, the action cannot proceed for the mere purpose of the recovery of costs.

9. The principle last announced does not apply to the status of an action, to recover a debt after it has been discharged in bankruptcy, commenced before such discharge.

10. An appeal from a judgment will not bring up for review an order entered denying a motion to set the judgment aside and grant a new trial.

11. Where a judgment is reversed and a new trial granted, this court has discretionary power under sec. 2949, Stats. 1898, to direct that the costs taxed in this court in favor of the prevailing party shall abide the final result in the court below.

12. Where the amount in controversy, exclusive of costs, is only $3.11 and the party appealing fails to take such proceedings in the court below as will render it probable that in case of a reversal a more favorable judgment will be obtained than before, and a new trial is required, the costs taxed in this court in favor of the prevailing party will be made to abide the final result.

[Syllabus by MARSHALL, J.]

APPEALS from judgments of the circuit court for Douglas county; A. J. VINJE, Circuit Judge. *One judgment affirmed; the others reversed.*

A main and two garnishee actions. The main action was to recover on a promissory note of $200. Defendant *Elliott* pleaded that the debt, as to him, had been discharged in bankruptcy proceedings prior to the commencement of the action. The three actions were submitted to the court for determination at the same time, on a stipulation of facts of which the following is the substance:

The first garnishee action was commenced March 8, 1898. The *Northwestern Coal Railway Company* answered, disclosing an indebtedness to defendant *Elliott* of $57.50 for wages earned in February, 1898, and $17.50 for wages earned in March, 1898, up to the time of the commencement of the garnishee proceedings, and claiming that such indebtedness was exempt as *Elliott's* wages, he having a family dependent upon him for support. A second garnishee action was commenced December 9, 1898. The garnishee answered disclosing indebtedness to *Elliott* of $72.10 as wages earned in November, 1898, and $24.60 as wages earned in December up to the time of the garnishment. Issue was taken by plaintiff on the answer of the garnishee in each case. December 29, 1898, *Elliott* was adjudged a bankrupt in the United States district court for the Western district of Wisconsin. The indebtedness sought to be recovered in the main action, at the time of the commencement thereof, was due plaintiff as alleged in the complaint, and no part thereof had been paid, but *Elliott* was subsequently discharged therefrom in the bankruptcy proceedings. An order was entered in such proceedings, upon objection made to the discharge of *Elliott*, authorizing the trustee therein, George E. Dietrich, to prosecute the garnishee action, commenced by plaintiff, for the benefit of the bankrupt's estate. February 17, 1899, in the bankruptcy proceedings, there was duly set apart for *Elliott*, as exempt property, his wages prior to March 8, 1898, amounting to $71.89, held by the garnishee, and also $45.23 earned by *Elliott* and held by the garnishee in the second garnishee action, said amounts representing the balance of the bankrupt's earnings of $60 per month for three months before the dates of the respective garnishments, and not exceeding $180 in all for each of the garnishments. The amount earned by *Elliott* for the three months preceding the first garnishment was $183.11, and for the three months preceding the second garnishment $231.67. The amount left

after deducting $180 for each three months is $54.78. The sum of $96.90 represents the amount earned by the bankrupt, held by the garnishee at the time of the second garnishment, December 9, 1898. November 1, 1898, an order was drawn on the garnishee by defendant *John E. A. Elliott* requesting payment of his wages for November to James T. Elliott, which said order was accepted by the garnishee November 2, 1898. December 10, 1898, $72.10 was paid upon said order. Thereafter James T. Elliott paid to defendant *Elliott* $50. James T. Elliott is a creditor of defendant *Elliott* and is represented in the bankruptcy proceedings. No part of *Elliott's* earnings, mentioned as held by the garnishee, has been paid to the trustee in bankruptcy or paid into court. Defendant *Elliott* is an unmarried man, but has a family dependent upon him for support. He is entitled to $60 per month as exempt under the statute. No judgment has been entered in this action against either of the defendants.

A bill of exceptions in each case shows that on the pleadings and the stipulation of facts motions were made by the plaintiff, in each of the garnishee cases, for an order making the trustee in bankruptcy a party to represent the estate. A motion was also made in the main action for a special judgment against *Elliott*, one not recognizing the existence of any personal liability but enforceable against the credits in the hands of the garnishee. The motions were denied, and due exception was taken to each ruling. A motion was made on behalf of defendant *Elliott* for a dismissal of the main action as to him, and a motion was also made in each of the garnishee actions to dismiss the same. All of such motions were granted, due exception to each ruling being taken. Judgment was thereupon entered in the main action, and subsequently costs were taxed and inserted therein, the amount being $24.63. Papers are in the record on the appeal in such action, relating to subsequent proceedings as to costs, but they all relate to proceedings in

the garnishee actions. Judgment was entered in the first garnishee action dismissing the same and in form for costs in favor of *Elliott* and the garnishee jointly. Two cost bills were presented to the taxing officers and were taxed, one in favor of the garnishee defendant for $23.53, and one in favor of the defendant Elliott and the garnishee for $31.23. Only the smaller cost bill as taxed was entered in the judgment. Objection was made before the taxing officer to the taxation of any costs, also to the following items which were allowed by the clerk: $3 for attending trial; 50 cents for sheriff's fees on serving the summons. There was a further objection to the taxation of any costs in favor of the garnishee because, the answer being made under sec. 2760, Stats. 1898, admitting a liability, the only costs allowable to the garnishee were $3. The rulings of the clerk were duly presented to the circuit court for consideration on a motion for a review of the taxation of costs, and the motion was denied. A motion was made after judgment, for an order setting the same aside and granting a new trial, which was denied, but the appeal was taken from the judgment only.

In the second garnishee action, judgment was rendered in form for costs in favor of defendant *Elliott* and the garnishee. Two cost bills were presented to the taxing officer for taxation, one for $23.53 in favor of the garnishee defendant, and one for $31.23 in favor of defendant *Elliott* and the garnishee. Both were taxed, but only the larger bill was included in the judgment. Objection was made before the taxing officer as follows: To the taxation of any costs; to the taxation of any costs in excess of $3; to the following items which were allowed: $3 for attending trial, $2 for a term fee, 50 cents sheriff's fees for serving summons. The exceptions to the rulings of the clerk were duly presented to the court for consideration on a motion for a review of the taxation of costs, and the motion was denied.

A motion was made after judgment, based on affidavits, for an order setting it aside and granting a new trial, which was denied. The appeal is from the judgment only.

Defendant *Elliott* neglected to plead his discharge in bankruptcy for several months after it was granted, and was then permitted to enter such plea in the main action, and in the second garnishee action, without the imposition of any terms. After such plea was interposed plaintiff made no offer to discontinue either of the actions, and after the lapse of several months they were brought to a hearing mainly on the defense, as before indicated, of the discharge in bankruptcy.

For the appellant there was a brief by *Reed & Reed*, and oral argument by *Myron Reed.*

For the respondents there was a brief by *Arnold & Arnold*, and oral argument by *N. B. Arnold.*

MARSHALL, J. It is claimed that the trial court erred, (1) in refusing to make the trustee in bankruptcy a party to the main action; (2) in refusing to award plaintiff a special judgment in such action; (3) in dismissing the actions or either of them; (4) in granting costs to defendant *Elliott* in the main action; (5) in granting full costs, or costs as taxed, to defendant *Elliott* and the garnishee defendant in the two garnishee actions; (6) in refusing to review the taxation of costs in each case; (7) in refusing to vacate the judgments and grant rehearings. So far as necessary or deemed advisable we will consider each of such propositions.

1. Counsel insists that because sec. 11b of the bankruptcy act provides that in a proceeding under it the federal court may order the trustee to enter his appearance and defend any pending suit against the bankrupt, and the trustee in the matter of *Elliott's* bankruptcy was so ordered, the circuit court having the garnishee actions in question in charge was bound to give effect to such order by granting the mo-

tion to make him a party to such actions. That subject was before this court and was fully considered in *National D. Co. v. Seidel*, 103 Wis. 489. We there held, and now affirm, that the federal statute, however mandatory its terms, does not control the practice in state courts and was not intended to do so. If an order be made under it commanding a trustee to intervene in the state court in an action to which the bankrupt is a party, the former performs his full duty when he makes a proper application to such court to be let in to such action. In disposing of such application the statutes of the state, and the rules and practice of its court, must necessarily govern, the same as when any other party invokes the court's jurisdiction.

Testing the ruling of the court, refusing to make the trustee in bankruptcy a party to the garnishee actions, by state laws and judicial policy, we fail to see why the trustee had any interest in the action that required his presence therein for his due protection, or why the entire controversy in such action, as to the plaintiff, was not susceptible of a complete determination without the trustee being brought in. Therefore, sec. 2610, Stats. 1898, did not require the trial court to grant the motion, but left it free to exercise its discretion in respect thereto. If we say plaintiff acquired a right, by the commencement of the garnishee action, to hold the garnishee liable for some part of its indebtedness to *Elliott*, and that such right, by operation of law, was displaced by the right of the trustee in bankruptcy so as to bring the latter within the scope of sec. 2801, then it would follow that the action of the trial court could not be disturbed unless it clearly appeared that there was an abuse of judicial discretion. Granting or refusing a motion under that section is, by its terms, addressed to the sound discretion of the court. In any event, since, as will be hereafter seen, there was no controversy between the trustee and appellant as to who should have the benefit of the liability of

the garnishee to *Elliott*, appellant was not prejudiced by the denial of the motion to make the trustee a party and cannot be heard to complain of such denial on this appeal. Sec. 2829.

Again, regardless of the rights of the trustee under sec. 2801, Stats. 1898, appellant has no standing here to recover on the assignment of error under discussion, because the privilege was one to be asserted by the trustee. He did not appear in the court below and ask to be made a party, as we understand the record, nor is he a party to the appeal. If it were otherwise, the question as to the trustee could not be reviewed except by an appeal in his behalf, from the order refusing to make him a party. The appeal from the judgment does not bring up such a question. The trustee not being a party to the action, proceedings in his behalf to make him such would be special. *National D. Co. v. Seidel*, 103 Wis. 489.

2. Whether the court erred in refusing to give appellant judgment in form against *Elliott* obviously depends upon whether, after the discharge in bankruptcy and the entry of the plea by *Elliott* in bar of further prosecution of the main suit as to him, appellant had a cause of action in any sense upon which a judgment could be rendered. It is conceded that if a defendant is discharged in bankruptcy from a debt, pending proceedings to enforce it, he is entitled to plead such circumstance in bar of further proceedings for a personal judgment, if the plaintiff does not voluntarily discontinue the action, and to recover on such plea. But it is said that if an action is wholly *in rem*, or partly *in rem* and partly *in personam*, its status as an action to reach the *res* is not disturbed by a discharge of the defendant in bankruptcy, if the plaintiff's interest therein be preserved by the bankrupt act. The authorities seem to be uniform to that effect. *Roberts v. Wood*, 38 Wis. 60; *Bates v. Tappan*, 99 Mass. 376; *Bowman v. Harding*, 56 Me. 559; *Leighton v. Kelsey*, 57 Me.

85; *Ingraham v. Phillips*, 1 Day, 117; *Jones v. Lellyett*, 39 Ga. 64; *Pierce v. Wilcox*, 40 Ind. 70; *Stoddard v. Locke*, 43 Vt. 574; *May v. Courtnay*, 47 Ala. 185; *Kittredge v. Warren*, 14 N. H. 509; *Munson v. B., H. & E. R. Co.* 120 Mass. 81. In *Bowman v. Harding*, it was insisted on behalf of the discharged party that he was, by the express terms of the bankrupt act, released from all his debts, and that no such discharged debt could, by implication, be considered to have sufficient life to form the basis of a judgment even in form against him. The court thought otherwise, reasoning that the language of the bankrupt act, preserving a lien incident to a debt, by implication preserved the debt notwithstanding its discharge, so far as necessary to make the lien effective. Treating of the same subject, in *Leighton v. Kelsey*, *supra*, the court said, in substance, the provisions of the bankrupt act are not to be construed so as to preclude the rendition of such a judgment as is necessary to enable a lien claimant, whose interest in property is preserved to him by the act, to perfect and realize upon it. In *Bates v. Tappan* this language was used:

"The provisions for a full discharge . . . must be construed, as they well may be, so as not to prevent the enforcement of a lien, which the statute itself permits, by any requisite proceedings therefor which do not involve a judgment *in personam*. A lien by attachment can be enforced in no other way than by the qualified judgment which was rendered in the superior court, and it must therefore be affirmed."

The present bankrupt act has the same features as the act of 1867 which were the foundation of the adjudications cited. It provides that "all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt," etc. Sec. 67, subd. f. The language as clearly, by

implication, preserves all liens claimed in legal proceedings, of sufficient age to be outside the four-months limit, as it expressly annuls those within such limit. The preservation of certain liens necessarily left the lien claimants free to pursue the necessary legal or equitable remedies to render them effective. So we must next inquire whether appellant, by virtue of the garnishee actions, or either of them, possessed a lien, within the meaning of the bankrupt act, which was in existence at the time the motion for a special judgment against defendant *Elliott* was made, entitling plaintiff to such a judgment, in order to render such lien effective.

3. We understand that it is not claimed that appellant acquired any lien in the second garnishee action that was not superseded by the rights of the trustee in bankruptcy, and annulled effectively for the purposes of the action by *Elliott's* plea therein of his discharge. In any event that is the situation disclosed by the record. It was to obtain the indebtedness of the garnishee involved in that action for the benefit of the bankrupt's estate that the motion was made to let in the trustee as a party in place of *Elliott.* In the first garnishee action it is claimed by appellant's counsel and apparently not denied by respondents' counsel, that the garnishee was liable to the extent of $3.11. That appears to be the truth of the situation, and we so hold. So the learned counsel for appellant have some standing in court upon which to present their claim that it was entitled to a special judgment. So we must determine the character of the liability of a garnishee within the meaning of the bankrupt act so as to say whether it may survive a discharge of the debt to which it is incident.

It is clear that under our statutes a garnishment does not create a lien, strictly so called, on the property of the principal debtor in the hands of the garnishee. The interest obtained is of an inchoate character. It does not reach the

property so as to constitute an actual interest therein, though it is true that such interest has been commonly called, by this and other courts, an equitable lien. The plaintiff cannot follow the property on the strength of any legal or even equitable interest therein, from the mere fact of the service of the garnishee process, but can control the property by seasonably acting to that end and thereby put the court in possession of the *res*. The mere service of a garnishee summons is, however, said to be an equitable levy on the property of the principal defendant in the hands of the garnishee, and fastens upon him the status of a trustee for the plaintiff, rendering him liable to account as such or suffer a judgment against him as provided by law. *Globe M. Co. v. Boynton*, 87 Wis. 619; *Maxwell v. Bank of New Richmond*, 101 Wis. 286. In the latter case it was held that the lien of a plaintiff in a garnishee action, on the property of his debtor in the hands of the garnishee, being purely equitable, since an appeal from a judgment in favor of the latter does not of itself operate as a *supersedeas* if an order is not seasonably entered continuing the equitable lien created by the service of the garnishee process pending the appeal, it will be irretrievably lost if the garnishee chooses or is compelled to part with the property prior to a reversal or if he is in any way bound, prior thereto, to answer to some other person who *bona fide* acquires the right. Other courts have held the same. *Webb v. Miller*, 24 Miss. 638. So the word "lien," in the bankrupt act, does not include the mere liability of a garnishee, unless it was used in the particular sense of all interests of one person in the property of another, whether legal or equitable, or whether equitable in the sense of being an actual or mere inchoate interest in the thing, whether tangible or intangible.

In properly determining the question of whether the word "lien" was used in the bankrupt act in a restrictive or broad sense, it is important to know whether the act should be con-

strued strictly or liberally. If we say a strict construction should be given thereto, there would be strong reason for saying that Congress had in view actual interests at least in property, not a mere right to acquire an interest or a right to hold a person liable to account as trustee. Without resorting to authority, it would seem that the bankrupt act should have a liberal construction under the general rule that obtains in construing remedial legislation, for that is obviously its character. The federal courts have so viewed the act, saying, in effect, that bankrupt laws existed long before the adoption of the constitution; that the intent thereof has always been to accomplish justice between debtors and creditors; that the power to legislate in that field is one of the important granted powers of the national government, and that a law passed in the exercise of such power should be regarded as purely remedial in character and be construed according to its spirit, with a view to effect its objects and to promote justice. *In re Muller*, Deady, 513. To the same effect are many decisions holding that the policy of the bankrupt act is as much to uphold certain liens as it is to annul others. Bump, Bankruptcy (11th ed.), 786.

Coming now to the question of whether a liberal construction of the word "lien," as it is used in the bankrupt act, can reasonably extend it to include a special interest of so shadowy a character that it does not attach to any particular thing, as does such an equitable interest as a mortgage, but only enables the court to act upon the party holding the *res*, we must look at the matter in the light of the commonly accepted character of the right of a plaintiff in garnishee proceedings and the name such right has commonly borne.

The courts have uniformly said, as before indicated, that the service of a garnishee process is an equitable levy upon the property of the debtor in the hands of the garnishee, and that the interest thereby obtained in such property is at least in the nature of an equitable lien, and has been com-

monly called a lien. In many cases it has been called a lien without qualification, in others an equitable lien, and in some a mere inchoate or incipient lien,—the mere commencement of proceedings to obtain a lien in fact. While the property is not *in custodia legis* in the sense of being in the actual control of the court, it is subject to such control because the court has power to possess itself of the *res* or to render a judgment for the value thereof against the garnishee. So the plaintiff in a garnishee case, as it seems, does acquire a special interest, even in a mere indebtedness of the garnishee to the defendant, denominated a lien, regardless of the diversity of opinion as to its real character. It is sufficient for this decision to reach the conclusion that it has been commonly called a lien, and may reasonably be so called, using the term in a qualified sense. The following cases treat the subject in its various phases: *North Star B. & S. Co. v. Ladd*, 32 Minn. 381; *Hawes v. Mooney*, 39 Conn. 37; *Hacker v. Stevens*, 4 McLean, 535; *Wallace v. McConnell*, 13 Pet. 136; *Cahoon v. Morgan*, 38 Vt. 234; *Wilder v. Weatherhead*, 32 Vt. 765. Some of the above authorities are to the effect that a garnishee levy creates a specific lien. Others are directly to the contrary. To the former view the following are more directly in point than any cited: *Focke v. Blum*, 82 Tex. 436; *Reed v. Fletcher*, 24 Neb. 435. The latter view is as firmly maintained in *Bigelow v. Andress*, 31 Ill. 322; *McGarry v. Lewis C. Co.* 93 Mo. 237; *McConnell v. Denham*, 72 Iowa, 494. Cases where the conflict is thus sharp, refer to specific property, not to mere indebtedness. As to the latter, the authorities are quite uniform that nothing in the nature of a specific lien is obtained by the commencement of garnishee proceedings, though a special right is acquired in the nature of an equitable lien.

So much as a general and original treatment of the question. But we are not wholly without guidance on the precise point at issue. In *In re Peck*, decided in the United

States district court for Vermont, 16 N. B. R. 43, it is said that the service of a garnishee process creates a lien within the meaning of the bankrupt act, saving liens created by law within four months of the filing of the petition in bankruptcy. *Stoddard v. Locke*, 43 Vt. 574, is referred to, where it was held that the service of a garnishee process creates an inchoate lien and a lien within the meaning of the bankrupt act, and that if it is of sufficient age to be preserved notwithstanding a discharge of the debtor and a plea by him in bar of further proceedings in the action to which the garnishee proceeding is incident, such discharge and plea are effective only to prevent the enforcement of any personal liability in such action, but, such a judgment as is necessary to be rendered to perfect and enforce the equitable levy in the garnishee proceedings, the plaintiff is entitled to as a matter of right.

From what has been said it appears that the trial court erred in dismissing the action against *Elliott*. Plaintiff had a lien within the meaning of the bankrupt act, almost trifling in amount to be sure, but yet it was large enough to be entitled to some recognition here, possibly only because of the question of costs that depended upon it. Otherwise it would be quite likely to fall within the maxim, *De minimis non curat lex*. As the case stands here, it does not appear that appellant is entitled to any relief that is within the discretionary power of the court to grant or refuse. We cannot consider it a sufferer to any extent but what might easily have been prevented. The question of whether it was entitled to any judgment whatever, as to *Elliott*, in face of the plea in bar and the admission of the truth of its allegations, was manifestly new to the trial court, as it was to counsel on both sides. The question involved a field where there has been no call for exploration till recently, within a period covering the professional career of many lawyers and judges of the present. Without the benefit of more time for the

study of the subject than a trial judge can ordinarily devote to such a matter, if left to reach a conclusion unaided by counsel, from the language of the bankrupt act alone, to the effect that a discharge in bankruptcy extinguishes every mere debt against the bankrupt and enables him to set up his discharge thereof in bar of any suit thereon whether commenced before or subsequent to such discharge, one would very reasonably reach the same conclusion that the learned trial court did in this case. He received no help from authorities, we must assume, though there were many to draw from under the bankrupt acts of 1867 and 1841. We feel warranted in saying this because, with the labor which counsel for appellant put upon the case in preparing it for this court, which we may assume was more thorough than that devoted to the enlightenment of the trial court, none of the numerous authorities on the subject are cited to our attention in the printed brief. We are therefore warranted in saying that the expensive litigation over the small amount of $3.11 and the incidental costs might easily have been avoided, and very little of the fault that it was not, if any, lies at the door of the learned trial judge. So much we have been called upon to say in the interest of a careful presentation of cases to trial courts, not intending to unduly reflect upon the learned counsel for appellant, whose record, generally, for careful preparation and presentation of cases, needs no vindication here or elsewhere. We are glad to be informed, however, that the three appeals before us, with the large amount of expenses involved, have for their purpose, not the recovery of $3.11 and some costs, but the vindication of a principle.

The basis of the dismissal of the garnishee action with costs was that the principal defendant had recovered judgment in the main action. The statute provides that when the garnishment shall not be in aid of an execution, no trial shall be had of the garnishee action until the plaintiff shall

have judgment in the principal action, and if the defendant shall have judgment the garnishee action shall be dismissed with costs. As we have found that the judgment against plaintiff must fall, the others, if they have no other basis than that to rest upon, must fall also. Judgment in the principal action is, as it appears, the sole basis at least for the judgment in the second garnishee action. That was commenced within the four months preceding the filing of the petition in bankruptcy, so whatever right was acquired by such commencement was subsequently superseded, as before stated, by the right acquired by the trustee in bankruptcy. So the dismissal of the second garnishee action was right, but the dismissal of the main action was wrong, and likewise that of the first garnishee action.

4. From what has been said it is manifest that the trial court erred in granting costs to defendant *Elliott* in the main action. But not upon the ground that there was no cause of action left after the discharge in bankruptcy, so as to bring the case within the rule in *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210. The contention of appellant's counsel on that point cannot be sustained. True, as stated in the case cited, costs are incident to a judgment rendered on a cause of action, and after such cause has been extinguished the basis for the incident no longer exists, and it is error to allow further proceedings in the action merely to give a party thereto an opportunity to enter a judgment for costs. But a cause of action to recover a debt is not for all purposes wholly extinguished by a discharge in bankruptcy. That, like a completed period under a statute of limitations, extinguishes the debt upon which it operates only in case it is insisted upon at a proper time and in a proper way. Notwithstanding a discharge in bankruptcy of a debt, it may be given new life by a new promise, or it may be deemed to exist regardless of the discharge if such discharge be expressly or by implication waived. The discharge does

not interfere with the jurisdiction of the court. It merely furnishes the defendant with a defense which he may use or not as he sees fit, it being essential to such use that the defense be pleaded like any other. It cannot be made available upon mere motion. *Fellows v. Hall*, 3 McLean, 487; *Nat. Bank v. Taylor*, 120 Mass. 124; *Manwarring v. Kouns*, 35 Tex. 171; *Horner v. Spelman*, 78 Ill. 206; *Seymour v. Browning*, 17 Ohio, 362. A court may for good cause even refuse to allow a discharge to be set up by amendment or by supplemental answer. *Falkner v. Hunt*, 76 N. C. 202; *Medbury v. Swan*, 46 N. Y. 200. The right to insist upon the discharge is purely a personal privilege. A garnishee is not bound to insist upon it in the garnishee action for the protection of the principal defendant, though he may do so. *Frasier v. Banks*, 11 La. Ann. 31. If the plaintiff act seasonably, after being informed of the discharge of his adversary in bankruptcy, he may discontinue his action and without costs, by permission of the court, which will ordinarily be granted. *Camp v. Gifford*, 7 Hill, 169. By omitting to do so and forcing the defendant to plead his discharge as a defense, he can no more thereafter be permitted to discontinue without at least paying costs from and after the introduction of the new defense, than in any other case. No one would claim that a plaintiff can discontinue as a matter of right without payment of costs, on the coming in of an answer setting up the statute of limitations, or that if a person recover on such a defense he is any the less entitled to costs under the statutes that award costs to the defendant in all cases where plaintiff is not entitled thereto, than where he prevails on the defense of payment or any other defense sufficient to defeat the plaintiff's cause of action. In this case plaintiff neglected to discontinue, so *Elliott* was compelled to answer, setting up his discharge as a defense. For aught he knew appellant's neglect to discontinue was based on some claim that the

discharge was ineffectual or would not be insisted upon. That being the case, there was still a cause of action before the court for adjudication, the determination of which would support a recovery of costs in favor of the prevailing party. The measure of costs recoverable by defendant, as to whether full or only costs from the time of interposing the discharge in bankruptcy as a defense, was under the control of the court in the exercise of its discretionary power, till waived by the indulgence of appellant's counsel. It appears that the time for answering expired long before the answer was tendered. It is quite likely that if appellant's counsel had stood upon their rights and compelled defendant to apply to the court for leave to answer setting up his discharge, a mere suggestion to the court of the propriety of doing so would have been sufficient to secure terms waiving all costs by defendant prior to the time of being granted leave to answer. No terms having been imposed, after the answer was served the case stood the same as any other. Appellant, on the face of the pleadings, was entitled to full costs in case it recovered, and if it failed, defendant was entitled to costs on the same basis as appellant would otherwise be entitled to. Secs. 2920, 2921, Stats. 1898. When the case was finally submitted, as before indicated, plaintiff was entitled to a special judgment against *Elliott.* Therefore, there was no room for a judgment for costs in the latter's favor.

5. What has been said renders consideration of the errors assigned in regard to the allowance of costs in the main and first garnishee actions unnecessary. Some attention, however, is required to the errors assigned as to the allowance of costs in the second garnishee action. The question of costs was not governed by sec. 2762. That provides that where there is a disclosure of indebtedness to the principal defendant, the garnishee may pay the same over to the clerk of the circuit court, less three dollars which he may

retain for his costs. That section contemplates a cause where no issue is tendered for trial. Issue was tendered in this case, and was accepted and duly joined, so that the cause stood for trial like any other action under sec. 2766, which gives costs to a garnishee defendant whenever judgment is rendered in the action in favor of the defendant. Costs were not governed by subd. 15 of sec. 2982, for the recovery was not based on the plea that the indebtedness was exempt. As defendant here was not entitled to judgment for reasons that have been stated, costs were not governed by the first part of sec. 2772, which provides that "in case of the trial of an issue between the plaintiff and any garnishee costs shall be awarded to the plaintiff and against the garnishee, in addition to his liability, if the plaintiff recover more than the garnishee admitted by his answer; and if he do not, the garnishee shall recover costs of the plaintiff," because that fits the situation where there is a recovery of something by the plaintiff on a contest. We have now referred to all specific cases where costs are provided for. The costs recoverable in this case seem to be governed by that part of sec. 2772 which reads as follows: "In all other cases under this chapter, not expressly provided for, the court may award costs in favor of or against any party in its discretion."

Appellant neglected to take a dismissal of the garnishee action as it might have done after the discharge in bankruptcy was brought to its attention. To obtain such dismissal *Elliott* was compelled to plead his discharge in bar of the main action and he also felt compelled to plead the same fact in the garnishee action. Appellant had some four months after the discharge before the plea in bar was interposed, within which it might have discontinued. It allowed over a year to elapse thereafter before the hearing, without attempting to discontinue. Defendant, in behalf of himself and the garnishee, was compelled to bring the

cause to trial. Upon the admitted facts he was entitled to and did recover. In that situation we cannot say there was any abuse of discretion in awarding costs jointly to him and the garnishee, to be taxed and allowed by the statutory fee bill.

The objection that costs were awarded jointly is untenable. Sec. 2766, Stats. 1898, provides that the proceedings against the garnishee shall be deemed an action by the plaintiff against the garnishee and the defendant as parties defendant. The defendant having answered as he had a right to do, and borne the burden of the litigation, the judgment for costs was very properly awarded in his favor as well as in favor of the garnishee.

6. We do not find that the objections to the few small items that were allowed in the cost bill are entitled to favorable consideration or call for any discussion.

7. In any view of this case counsel's last proposition need not be considered. In that, complaint is made because plaintiff's motion to set aside the garnishee judgments and for rehearings was not granted. The appeal being from the judgments, the subsequent orders are not reviewable. We have a statute enabling the court to review certain intermediate orders on appeal from the judgment (sec. 3070, Stats. 1898), but none allowing a review on such an appeal of an order entered after judgment. Such an order must be presented by an appeal therefrom, though such appeal may be joined with one from the judgment. Sec. 3049, Stats. 1898; *Leary v. Leary*, 68 Wis. 662; *Second Nat. Bank v. Larson*, 80 Wis. 469.

Now we have reached a point where it is seen that the judgment in the second garnishee action must be affirmed and the other two judgments reversed. But inasmuch as it does not appear that the equitable levy on the $3.11, which all this litigation is about, aside from costs and the more important matter of vindicating the principle involved

(we do not lose sight of that), was preserved pending this appeal, it is difficult to see how appellant has any reasonable certainty of any satisfaction in the end, except what will flow from such vindication. We cannot remand the cause with directions for judgment in the court below. The equitable levy was extinguished by the judgment dismissing the garnishee action, and if in the meantime the indebtedness involved has been discharged, a reversal of the judgment will not revive the levy. So we must remand the cause for a new trial with directions that, if, prior to the reversal, the garnishee shall have paid the indebtedness sought to be reached, it shall be permitted to plead that fact as a defense to further proceedings against it; and that the defendant also shall have a like privilege in the main action, because, without a revival of the lien, so called, there will be no basis for a special judgment, and in that event the final result will be a second dismissal of both actions. It seems that in this situation the court should use the discretionary power vested in it by sec. 2949, Stats. 1898, awarding costs to the prevailing party to be taxed by the clerk of this court, but to abide the final result in the court below.

By the Court.—The judgment appealed from in the main action is reversed, and the cause remanded for a new trial with directions to permit defendant to plead payment of the indebtedness sought to be reached in the garnishee action subsequent to the dismissal thereof, the costs of the prevailing party to be taxed and allowed in this court, but to abide the final result in the court below, and if plaintiff prevails there, such costs to be allowed in such court as disbursements. The judgment appealed from in the first garnishee action is reversed, and the cause remanded for a new trial with directions to permit the garnishee to plead, in defense of further proceedings, payment of the indebtedness sought to be reached subsequent to the dismissal, the costs of the prevailing party taxed and allowed in this court

to abide the final result in the court below, and if plaintiff prevail there, such costs to be taxed in its favor as disbursements. The judgment in the second garnishee action is affirmed with costs in favor of respondents in this court.

McGibbon, Appellant, vs. Walsh, Respondent.

March 2 — March 19, 1901.

Pleading: Partnership: Assumption of debts by one partner: Witnesses: Refreshing recollection.

1. A complaint alleging that defendant and another were partners in carrying on a hotel; that plaintiff sold said partners milk, for which a balance is still due; and that thereafter defendant purchased the interest of his partner and as part of the consideration agreed to pay the debts of the firm, states a cause of action for the enforcement of defendant's promise to pay the firm debts and not a cause of action to enforce a partnership obligation.
2. The court having ruled that a witness might refresh his recollection by referring to a magistrate's notes of testimony in another case, he replied that he could not read. *Held*, not error to refuse to allow counsel to read such notes to him, in the absence of anything to identify them or substantiate their truthfulness.

Appeal from a judgment of the superior court of Douglas county: Charles Smith, Judge. *Affirmed.*

The complaint alleges that between January 4 and July 17, 1894, the defendant and one Collins were partners, and as such carried on the business of running a hotel at Superior, Wisconsin; that between the dates mentioned plaintiff sold said copartners milk; that there is still a balance due of $109.05. About July 17, 1894, Collins sold out to defendant, and as a part of the consideration for such sale he agreed to pay the debts of the partnership. Defendant answered by general denial, with an allegation of payment. There was no proper denial under oath of the allegation of

partnership. At the close of the testimony the court directed a verdict for defendant. A motion to set aside the verdict and for a new trial was denied, and from the judgment for defendant the plaintiff has taken this appeal.

The cause was submitted for the appellant on the brief of *Victor Linley*, and for the respondent on that of *A. T. Rock.*

BARDEEN, J. The trial court held that this was an action upon an alleged promise of defendant to pay the debt due plaintiff, and, there being no evidence to sustain such promise, directed a verdict for defendant. The plaintiff now claims that two causes of action are stated in his complaint; one for the collection of a partnership obligation, and the other upon the promise of defendant to pay the debt sued for. If this be admitted, still we are unable to see how the plaintiff has shown any right of recovery. The allegation of copartnership between defendant and Collins was not denied under oath, and must be taken as an admitted fact in the case. There is, however, no proof that the milk sued for was ever sold or delivered to the partnership. The testimony shows that the milk was delivered at the Occidental Hotel, and that Mr. Collins was the proprietor. There is not a word in the testimony that the copartnership was running the hotel business. Without such proof, no recovery could be had upon this alleged cause of action. But we do not think the complaint is susceptible of the construction contended for. It seems very plain that the real cause of action is based upon the dissolution of the firm and the alleged promise of defendant to pay all of the firm debts. If such promise had been proven, a recovery would have followed. That the plaintiff proceeded upon this theory is evident from the fact that his efforts on the trial were directed towards establishing such promise. If he had been seeking to enforce a partnership obligation, Collins, the

other partner, was a proper party. If, however, the defendant had urged the objection of a defect of parties, he would have been met with the assertion that the action was founded upon the promise to pay, which would have been a complete answer. The plaintiff cannot be permitted to occupy such inconsistent positions. The procedure upon the trial indicates that he was relying upon defendant's promise to pay his debt. The trial court properly determined that there was no evidence of such promise sufficient to require a submission of the question to the jury.

The claim that the court erred in refusing to allow plaintiff's attorney to refresh the recollection of the witness Collins by referring him to the magistrate's notes of testimony in some other case is not well founded. The court ruled that he might so refresh his recollection, whereupon the witness replied that he could not read. Counsel then asked the privilege of reading the testimony to him, which was denied. No effort was made to identify or substantiate the truthfulness of the magistrate's notes. Under those circumstances the ruling of the court was correct.

By the Court.— The judgment of the superior court of Douglas county is affirmed.

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In re Assignment of Bank of West Superior: Goodvin, Appellant, vs. Nichols, Assignee, Respondent.

March 2 —March 19, 1901.

Mortgages: Release by parol: Estoppel: Banks and banking: Action of directors: Evidence: Records.

1. The lien of a mortgage upon land may be effectually released without writing and without actually delivering up the instrument, if the oral release is so acted upon and carried into execution as to arouse equities demanding protection on the principle of estoppel.

2. If no record was kept of the action of directors of a bank in regard to releasing a mortgage, parol evidence is proper to prove the transaction. [Whether there is any presumption of the existence of any record of executive acts done by directors, not determined.]

3. Testimony of a witness who, at the time in question, was president of the bank, that he did not think the action of the directors in a certain matter, including the release of a mortgage, appeared on the records, was sufficient *prima facie* to deny the existence of any record, where the record books were in the control of the adverse party.

APPEAL from a judgment of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Reversed.*

The Bank of West Superior being in the hands of the defendant as assignee, one I. W. Burhans, who had been president of the bank, presented a claim on March 16, 1897, for $5,377.26, balance of deposit account, which was not controverted. This claim was afterwards assigned to *J. L. Goodvin*, the plaintiff herein. The defense consisted of three counterclaims, of which only one was sustained. It is to the effect that on June 20, 1889, one Edmund Rice, Jr., gave to the bank his note for $15,000, payable five years after date, with interest at eight per cent., reciting on its face that it was "secured by mortgage upon lots 11, 12, 13, and 14, block 38, First Division of West Superior," and on the same day, to secure the same, executed a mortgage in usual form upon the above-described premises, which mortgage was never recorded. On December 1, 1890, Rice conveyed those premises, together with others, to said Burhans, by a warranty deed containing the clause, "subject, however, to all incumbrances now existing on said premises, and which incumbrances said party of the second part hereby assumes and agrees to pay, as part of the consideration for the above-described premises." Rice's note never having been paid, the defendant claimed liability of Burhans to the bank for said sum of $15,000 and some accrued interest, as a setoff or counterclaim in the action.

The claimant interposed reply, and by way of defense to said counterclaim asserted that some time prior to the making of said deed of December 1, 1890, the bank released its said mortgage and accepted the personal liability of Rice, and, to effect such release, delivered up the mortgage to Mr. Burhans for Rice, and that Burhans purchased of Rice in reliance upon such release. The mortgage claimed to have been delivered to Burhans remained within the bank, where Burhans had a private office and his own papers, among which, he testifies, the mortgage was kept. At the time of the assignment he left the bank, and did not enter it again up to the time of trial. The Rice note, accompanied by the mortgage, was delivered to the assignee by the former cashier of the bank, together with other securities, after the assignment. There is no express finding whether such transaction claimed to constitute a release occurred. The court found as a fact that the deed to Burhans "was made subject to all incumbrances which existed on said premises at the date of said deed, and in and by the terms and conditions of said deed said I. W. Burhans assumed and agreed to pay, as part of the consideration for said premises, said incumbrances, including the said mortgage given to the Bank of West Superior by said Edmund Rice, Jr.;" also that, by reason of the omission to record that mortgage, it had been cut off by subsequent mortgages, thus taking precedence over it, so that it had become of no value, and Rice had become financially irresponsible. The amount of such indebtedness exceeding the amount of plaintiff's claim, judgment was rendered in favor of the defendant, from which the plaintiff appeals.

For the appellant there was a brief by *Geo. B. Hudnall* and *W. E. Pickering*, and oral argument by *Mr. Hudnall.*

George P. Knowles, for the respondent.

DODGE, J. The principal, if not the only seriously controverted, question is whether the bank corporation, acting

by its directors, released its mortgage lien effectively, either as against the mortgagor, Rice, or against his grantee, Burhans. That an equitable interest in land or a lien thereon may be released without writing is well established. *Telford v. Frost*, 76 Wis. 172; *O'Donnell v. Brand*, 85 Wis. 97; *Goldsmith v. Darling*, 92 Wis. 363; *Slaughter v. Bernards*, 97 Wis. 184; 1 Jones, Mortgages, § 974. From these authorities it would seem that mere words will not suffice, unless confirmed by the delivery up of the mortgage, or unless so acted on and carried into execution as to arouse equities demanding protection on the principle of estoppel. The transaction claimed to have effectually released the unrecorded mortgage from Rice to the bank is established only by the testimony of Burhans, but the testimony is, save for one statement to be hereafter mentioned, wholly without contradiction, and, unless so improbable as to be beyond reasonable credence, must be taken as establishing the facts asserted, especially when the adverse party has failed to call any of the numerous other participants, namely, the directors of the bank. The single statement of Burhans which can be said to be in any wise in conflict is that Rice's mortgage was delivered up to him (Burhans), so as to be physically separated from other papers belonging to the bank. This is claimed to be controverted by the fact that, when the cashier delivered to the assignee the securities, the Rice note and this mortgage were among them and were together. How soon after assignment this was done is not made to appear, nor whether in the interval the cashier had access to Burhans's papers kept by him within the bank. It is in some measure affected by the fact that the inventory made by the cashier under the law specified the note, but made no reference to any mortgage security therefor.

Mr. Burhans's testimony, then, if credible, establishes that the exigencies of the situation required the clearing of title

of the property in question in order to enable its improvement, in which the bank apparently was in some measure interested, and that the bank, acting by its directors, released to Mr. Rice this mortgage lien; that he took steps to carry out the plan of the improvement, in the course of which the property was transferred to Burhans, and loans for its improvement negotiated thereon. By the deed, Burhans assumed the incumbrances, and paid off such as there were other than this mortgage, which he always treated as nonexistent, and which the bank never suggested claim upon, from the transaction narrated, some time in 1890, up to the service of their counterclaim in January, 1900, during all of which time Burhans had been apparently solvent and collectible, and the bank had been in such straits as ultimately to make assignment for its creditors. Such evidence seems to fully satisfy the rules above indicated for release of mortgage lien by word and acts, independently of consideration whether manual delivery up of the mortgage was made. The agreement and purpose upon which the release was made has been executed, both Rice and Burhans have acted on the faith of such release, so that the latter must suffer seriously if it be not held effective, and the subsequent conduct of the bank has been such as to confirm the understanding testified to.

Objection is made that parol evidence was not admissible to prove the acts of the directors. Doubtless, if a written record was kept of their meeting and action, that would be the best evidence; but, if no record was kept, then parol evidence is as proper to prove such transactions as any other. *Zalesky v. Iowa State Ins. Co.* 102 Iowa, 512; *Duluth, S. S. & A. R. Co. v. Douglas Co.* 103 Wis. 75. It may be doubtful whether there is any presumption of the existence of any record of *executive* acts done by directors, such as negotiating and contracting directly with others, whatever may be the rule as to their procedure when convened as a board for

deliberation and legislation as to corporate affairs. In the instant case, however, we may pass that question, for the witness Burhans testified that he did not think the action of the directors as to the Rice matter appeared on the records. This suffices, *prima facie*, to deny the existence of any record, when definite proof on the subject — the record books themselves — were in the control of the adverse party. If Mr. Burhans was mistaken, the defendant could easily have shown that fact, and, in the absence of such showing, cannot complain of admission of parol evidence.

We must hold that the transactions testified to by Mr. Burhans constituted an effective release of the mortgage lien, and that no incumbrance in favor of the bank rested on the property conveyed by Rice to Burhans, so that the alleged liability of the latter for Rice's debt of $15,000 is not established. The indebtedness of the bank to *Goodvin* is declared by the findings, and none of the defenses thereto is sustained.

By the Court.— Judgment reversed, and cause remanded with directions to allow the plaintiff's claim in accordance with the complaint.

FITZGERALD, Plaintiff in error, vs. THE STATE, Defendant in error.

March 2 — March 19, 1901.

Criminal law and practice: Burglary: New trial: Discretion.

Upon a motion for a new trial, made by a defendant who, on the day after his arrest, had pleaded guilty to an information for burglary, it was urged that he was only eighteen years old, simple-minded and foolish, and was intoxicated when he broke and entered the building; that he had no lawyer to advise him, and no relative or friend to counsel with, but was advised, coaxed, and threatened by the police officers to plead guilty. Upon the evidence, however, ad-

duced before the trial court upon the hearing of the motion, it is *held* that it was not made to appear that justice had not been done, and that there was no abuse of discretion in denying the motion.

ERROR to review an order of the circuit court for Douglas county: A. J. VINJE, Circuit Judge. *Affirmed.*

V. Linley, for the plaintiff in error.

For the defendant in error there was a brief by the *Attorney General*, and oral argument by *C. E. Buell*, first assistant attorney general.

CASSODAY, C. J. At or about half past 2 o'clock on the morning of September 21, 1900, the plaintiff in error was arrested on the landing at the head of the flight of stairs leading from the basement of Stern's store building at the corner of Seventh street and Cummings avenue, in West Superior. He had gained access to the building by tearing up a heavy sidewalk adjacent thereto on Cummings avenue, which required a great deal of force to raise, and entering through a window beneath the walk. After he reached such landing, he attempted to forcibly enter the store occupied by Stern, but was prevented by one Ole Hanson, who had been a clerk in the store, and was then sleeping therein, and who was awakened by loud knocking and kicking on the door leading from his sleeping room into the cellar. The plaintiff in error had drank a considerable during the previous day and evening, but the extent of his intoxication at the time of his arrest was in dispute. At the time he was arrested he said, "I am up against it." He was taken to the municipal court about 2 o'clock in the afternoon of September 21st, and, after some talk, waived his preliminary examination, and was bound over to the circuit court. On the next day he was arraigned in the circuit court, and pleaded guilty to an information charging him with wilfully and feloniously breaking and entering in the night-time the store building

mentioned, then and there used and occupied by one Louis Stern as and for a shop or store, with intent on the part of said *M. J. Fitzgerald* to then and there commit the crime of larceny therein; and he was thereupon sentenced to the state prison for the term of three years.

The officers testified to the effect that when he entered such plea he was entirely sober; that he was fully informed of the serious nature of the charge against him, and the punishment provided therefor, and that he fully realized the same; that no coercion or intimidation was used by the officers having him in charge, nor was he advised by any one to plead guilty; that he was asked by said officers if they should not inform his parents, but he said that he did not want them to know of his arrest until after he was sentenced; that he requested to be taken at once to the circuit court, and receive his sentence, and commence serving his time, and not be compelled to lie around the county jail, where his time would not count upon his sentence. Upon being arraigned in the circuit court, the information was read to him, and he pleaded guilty. Before sentence was pronounced, he was asked by the court if he had anything to say why sentence should not be passed upon him, to which he replied, "No." It appears that he had theretofore been sentenced to the reform school on a criminal charge; that his mother had gotten him released on his promise to keep away from sporting houses and that he would go to work, and for this reason he did not want his mother to see him before he was sentenced; that three other burglaries of the same character had been committed in the vicinity of Stern's store just previous to the commission of this offense; that, before pleading guilty, or waiving his examination in the municipal court, he was taken to the judge's private room by the officer in charge, and was accused of having committed these various burglaries; that he denied the same; that, after having pleaded guilty, he was

taken into the chief of police's room, and was informed of the evidence against him; that he thereupon admitted having committed all of these crimes, and told the officers just how each offense was committed.

The plaintiff in error testified to the effect that he did not remember how he got into Stern's grocery store; that he did not go in there to steal; that he was pretty drunk when arrested, but walked straight with the officer who arrested him; that the officers advised him to plead guilty, saying that there was no use of his fighting it and that they would bring other charges against him if he did not plead guilty; that when they charged him with other offenses he told them that he had not done these things, but had knowledge about them; that they were done by others; that he pleaded guilty in the circuit court because he thought it was the only thing he could do; that he supposed he was bound by what he said in the municipal court; that he did not know his age, but supposed he was about twenty-one years old, and so stated in the circuit court; that when he got drunk he was crazy and did not know what he was doing.

After he was sentenced, and before being sent to the state prison, his parents were notified and visited him; and his mother testified that he was only eighteen years of age. Soon after he was thus sentenced, his parents retained counsel, and on October 29, 1900, such counsel moved the circuit court to set aside the judgment and sentence and the plea of guilty, and for a new trial, basing such motion upon the affidavit of the prisoner and his parents and three others, and upon the hearing of the motion the state presented five affidavits in opposition thereto. A summary of the facts stated in the several affidavits is given above. After the hearing the circuit court took the motion under advisement, and November 13, 1900, denied the same, and thereupon entered an order upon the merits to that effect. To reverse that order the prisoner sued out this writ of error.

Under the statute as it existed prior to 1897 it was held by a divided court that an order denying a motion for a new trial, made after judgment in a criminal case, was not a final judgment, nor an order in the nature of a final judgment, to review which a writ of error would lie. Sec. 4719, R. S. 1878; *Jackson v. State*, 92 Wis. 422. In that year that section of the statute was amended by adding thereto a provision to the effect that, when an application for a new trial under that section should be refused, a writ of error should, on the application of the defendant, be issued from this court to bring such matter before it; and that upon such writ this court should "have the power to review the order refusing to grant a new trial, and render such judgment thereon as it" might deem proper. Sec. 4719, Stats. 1898; ch. 9, Laws of 1897; and ch. 172, Laws of 1897. In the body of the section it is provided, in effect, that "on the petition or motion in writing of the defendant" within one year after conviction, and either before or after judgment, the circuit court may "grant a new trial for any cause for which by law a new trial may be granted, or when it shall *appear* to the court *that justice has not been done*, and on such terms and conditions as the court may direct." The only question for consideration, therefore, is whether it was made to *appear* to the trial court that justice had not been done to the plaintiff in error. The argument of his counsel is to the effect that he was only eighteen years of age; that he was simple-minded and foolish, and that it was "on the top of that heavy drink;" that he had no lawyer to advise him, and no relative or friend to counsel with; that he was advised, coaxed, and threatened by the officers in charge to plead guilty. The breaking and entering of the building is conceded. He was not so much under the influence of liquor when arrested but that he could walk with the officer and comprehend his situation. The reason why he pleaded guilty without consulting his parents is obvious from the

statement made. We have carefully examined the evidence, and cannot say that justice has not been done. On the contrary, we think it has been done. Besides, the granting of the order was discretionary, and we do not think there was any abuse of such discretion.

By the Court.—The order of the circuit court is affirmed.

BULOW, Appellant, vs. HETTING, Respondent.

March 19—April 9, 1901.

Appeal: Exceptions.

A general exception to a finding determining defendant's credits on a mutual account, such credits consisting of ten separate items, one of which was undisputed and a number of them amply supported by the evidence, is not sufficiently specific to be available on appeal.

APPEAL from a judgment and an order of the circuit court for Polk county: A. J. VINJE, Circuit Judge. *Affirmed.*

For the appellant the cause was submitted on the brief of *Frank B. Dorothy.*

For the respondent there was a brief by *Mons P. Jerdee,* attorney, and *Sanborn, Luse, Powell & Ellis,* of counsel, and oral argument by *F. C. Ellis.*

WINSLOW J. This was an action upon a promissory note for $82.30 and interest. The defendant admitted the execution of the note, but alleged payment, and also set up a counterclaim consisting of an account for a considerable number of items of lumber and other personal property sold, to an amount largely in excess of the note. The action was tried by the court, and findings made to the effect: first, that there was a mutual account between the

parties; second, on a statement of such account the plaintiff should be credited a number of specific items of cash advanced, including the amount of the note in suit, aggregating $552.03; that the defendant should have credited on such account specific items of goods and merchandise, or the proceeds thereof, amounting to $791.48, the items of said account on both sides being set forth in detail; third, that the balance due the defendant from the plaintiff was $239.45,— and for this amount, with interest and costs, judgment was rendered, and a subsequent motion to set aside the judgment and for a new trial was overruled.

The plaintiff did not except to the finding so far as it found the amounts which should be credited on the plaintiff's side of the account, but excepted generally to the finding which determined the defendant's credits upon the account; said finding being composed of ten separate items. No separate exception was preserved to any specific item of the account. One at least of these items is undisputed, and a number of them are amply supported by the evidence. In this situation the rule is well settled that there is no available exception. *Warner v. Cuckow*, 90 Wis. 291. This finding, which states the account between the parties, really contains the gist of the whole case; and, there being no exception to any part of it, it cannot be disturbed upon appeal. Moreover, the findings all seem to be sufficiently supported by the evidence in any event.

A number of objections and exceptions to rulings upon evidence are preserved, but they are trivial and could not affect the result in an action tried by the court. We do not deem it necessary to notice them in detail.

By the Court.— Judgment and order affirmed.

INDEX.

ABATEMENT.
Of action. See ACTION, 3–5. BANKRUPTCY, 3–6.
Of purpresture. See WATERS, 15, 16.

ACCOUNT. See LIMITATION OF ACTIONS, 5, 6.

ACCOUNTING. See PARTNERSHIP, 5.

ACTION.

Cause of action. See ACTION, 1–5. BANKRUPTCY, 3–6. BANKS, 7. CONSPIRACY. CONTRACTS, 1. HUSBAND AND WIFE, 2, 3, 7. LIENS, 2. MASTER AND SERVANT. MONEY HAD AND RECEIVED. MUNICIPAL CORPORATIONS, 11–13, 16, 19, 20. PARTNERSHIP, 4, 6. PAUPERS, 2–4. SALES, 8, 9, 12–14. SCHOOLS, 3, 4. WATERS, 15, 16.

Abatement. See ACTION, 3–5. BANKRUPTCY, 3–6.

Conditions precedent. See LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 19, 20.

1. Failure to perform a condition precedent to the existence of a right, as that prescribed by sec. 1339, Stats. 1898, prevents the acquirement thereof, and may be insisted upon at any stage of judicial proceedings in respect thereto. *O'Connor v. Fond du Lac,* 253

2. Failure to perform a condition of the use of a judicial remedy to enforce a right having no dependence thereon for its existence — such as the condition requisite to the continued existence of a claim against a railway for the negligent killing of stock by a railway train, or damage for the negligent setting of fires by a locomotive engine, under sec. 1816*b*, Stats. 1898 — is waived if objection is not taken by answer or demurrer, the statute, to all intents and purposes, being a statute of limitations and governed as such. *Ibid.*

3. Failure to perform a statutory condition precedent to the commencement of an action — as one that no action shall be commenced to enforce a city liability until notice shall have been given of the existence thereof and the common council of the city have had an opportunity to pass upon the same — has the same effect as failure to comply with a statute of limitations. It is in the nature of such a statute, though failure to comply with it may only abate the action if objection be taken by answer or demurrer. If not so taken the objection is waived. *Ibid.*

Limitations. See ACTION, 2, 3. BANKS, 9, 10. LIMITATION OF ACTIONS. MUNICIPAL CORPORATIONS, 19, 20.

Delay as a bar. See CORPORATIONS, 13. EQUITY, 4.

By whom to be brought — Who may maintain. See BANKS, 1, 6. SCHOOLS, 4.

Joinder of causes of action. See BANKS, 7. LIENS, 2, 3. SCHOOLS, 4.

Election between claims. See FORFEITURES, 2. SALES, 7, 8.

Extinguishment of cause of action after suit brought: Costs. See BANKRUPTCY, 3–6.

4. Where a cause or action, existing at the time an action was commenced to enforce it, has been fully extinguished, the action cannot proceed for the mere purpose of the recovery of costs. *Bank of Commerce v. Elliott,* 648

5. The principle last announced does not apply to the status of an action, to recover a debt after it has been discharged in bankruptcy, commenced before such discharge. *Ibid.*

At law or in equity? See CORPORATIONS, 12. LIENS, 2. SCHOOLS, 4.

ADMINISTRATOPS. See EXECUTORS AND ADMINISTRATORS.

ADVERSE POSSESSION.

See HIGHWAYS, 6. WATERS, 5–11, 18.

1. While the owner of a hotel was using part of the premises as a private way to the hotel barn, the owner of the adjoining lot commenced to use the same way as a means of access to and egress from the back part of his lot. *Held,* that such use by the adjoining owner would be presumed to have been permissive, in the absence of evidence to the contrary, and therefore could not ripen into title by adverse possession. *Frye v. Highland,* 293

2. Occupancy commencing by permission of the true owner cannot operate as a disseisin until it becomes visibly in defiance of his rights. *Ibid.*

3. No title can be obtained, by adverse possession for twenty years, to land held by the state in any capacity. *Illinois Steel Co. v. Bilot,* 418

4. The elements of actual possession necessary to draw to it constructive possession, when an adverse claim to real estate is founded on color of title under sec. 4211, Stats. 1898, are the same as actual occupancy under sec. 4213, as construed by sec. 4214, though the evidence deemed sufficient to establish occupancy under the latter sections may not be so deemed under the former, the circumstance of color of title being of itself significant as to the nature of the possession. *Ibid.*

5. The only substantial difference between adverse possession under sec. 4211, Stats. 1898, and such possession under sec. 4214, is that under the former actual possession is extended by construction to the limits of the land described in the paper conveyance or judgment constituting the basis of color of title, while under the latter the adverse claim is limited by the actual adverse occupancy. *Ibid.*

6. When unexplained actual occupancy for the requisite length of time has been clearly established, either under sec. 4211, Stats. 1898, or secs. 4213, 4214, the presumption of seisin in the true owner within such time disappears, and the presumption that the requisites of adverse possession have been complied with by the occupant arises under sec. 4210. *Ibid.*

7. No particular kind of inclosure, nor any inclosure, is required to establish adverse possession as a matter of fact under sec. 4214, Stats. 1898; but if such an inclosure is relied upon to establish such pos-

session as a matter of law, it must be of a substantial character, though not necessarily artificial, so as to be effective as a protection against outside interference in adapting the premises to some suitable use. *Ibid.*

8. If a *usual improvement* is relied upon to establish adverse possession, an inclosure of any character, partly or wholly marking the boundary claimed, or any other method of clearly defining such boundary, accompanied with circumstances satisfactory to a jury to establish the essential facts, is sufficient. *Ibid.*

9. A *usual improvement*, within the meaning of sec. 4214, Stats. 1898, does not require improvement of the land in value, but any actual use thereof to which it is adapted and to which the owner or one claiming to be the owner might reasonably devote it. Occupation of a locality for a burial lot, or some other purpose that would partially or wholly destroy its value, may be as effective an improvement as any other, according to the circumstances. *Ibid.*

10. What will constitute actual possession in the sense of being a usual improvement of real estate within the meaning of sec. 4214, Stats. 1898, varies according to the character of the land, its location, and all circumstances bearing on the question. That there must be a *usual improvement*, where that is relied upon, is a matter of law; what is such an improvement is a matter of fact. *Ibid.*

11. Continued, exclusive, notorious use of premises covered by water for the purpose of hunting and fishing, with other circumstances, may tend to establish adverse occupancy so as to carry a case to the jury, under proper instructions, to say whether there was such an occupancy as to constitute disseisin of the true owner. *Ibid.*

12. Actual occupancy of premises, so as to indicate at every instant of time, by mere observation, the extent of the hostile use, is not necessary to satisfy sec. 4214, Stats. 1898. It need be only such continuous, exclusive, hostile use as in the judgment of the jury, under all the circumstances, is sufficient to notify the true owner, actually or constructively, of the invasion of his rights and the actual extent thereof. *Ibid.*

13. A pleading or finding stating that certain land had been in the actual and continuous occupancy and possession of the plaintiff and her grantors for more than forty years, and that they had during that time erected valuable buildings thereon, but not stating that such possession was adverse or under claim of any exclusive right, is insufficient to show title in the plaintiff by adverse possession. *Davis v. Appleton*, 580

AGENCY. See BROKERS. CORPORATIONS. 6, 7, 15–17. LANDLORD AND TENANT, 1. SALES, 11. VENDOR AND PURCHASER, 1, 2.

ALIMONY. See DIVORCE, 1.

ALTERATION OF INSTRUMENTS. See BILLS AND NOTES. GUARANTY.

AMENDMENT of undertaking. See APPEAL, 5.

APPEAL AND ERROR.

From what appeal may be taken: Orders. See JUDGMENT, 6.

1. On an appeal to this court from an order made upon a summary application after judgment, the only complaint being that the lower court abused its discretion, the jurisdiction of this court depends upon whether there was such abuse. The proper practice is to re-

verse the order appealed from if it is found to be the result of an abuse of judicial discretion; otherwise, to dismiss the appeal. *McElroy v. Minnesota P. H. Co.* 116

2. If a case be made to obtain the favor of the court, and all the material statements relied upon to secure such favor be denied under oath, or explained, or the effect thereof displaced by other sworn statements, this court cannot say that a refusal to grant such favor was an abuse of judicial discretion. *Ibid.*

3. Sec. 3049, Stats. 1898, which allows a single appeal to embrace both an appealable order and the judgment in the action, is not limited to cases in which the two can be disposed of together in this court. *Ibid.*

4. An order granting a new trial being one from which an appeal is expressly given by subd. 3, sec. 3069, Stats. 1898, the supreme court will not dismiss the appeal if there was no abuse of discretion, but will affirm the order. *Allen v. Coe,* 635

By whom appeal may be taken: Who will be heard. See BANKRUPTCY, 2. WILLS, 2–4.

Appeal as waiver of lack of jurisdiction. See APPEARANCE.

Undertaking: Sufficiency.

5. An undertaking on appeal from a judgment of foreclosure is *held* sufficient to give this court jurisdiction, although the plaintiff's name was omitted from the blank for the respondent, and the wrong defendant was named as mortgagor; and appellant was allowed, on the argument in this court, to file an amended undertaking. *Rockman v. Ackerman,* 639

Record: Bill of exceptions. See NEW TRIAL, 1. SALES, 6.

6. When the trial court, sitting with a jury, expressly decides an issue of fact, it will be presumed on appeal that its decision was supported by uncontroverted evidence, in the absence of a bill of exceptions certified to contain all the evidence; and the fact so found will be considered in connection with the pleadings and verdict in determining whether the judgment is supported thereby. *Optenberg v. Skelton,* 241

7. The supreme court on appeal will not review alleged errors in the charge to the jury unless the entire charge is incorporated into a bill of exceptions and made a part of the record or referred to in such manner that it may be fully identified. Detached portions preserved in exceptions will not be considered. *Gaertner v. Bues,* 165

8. Refusals to give requested instructions cannot be reviewed on appeal unless exceptions thereto are taken and preserved in the bill of exceptions. *Stubbings v. Curtis,* 307

9. Where a record is offered in evidence and rejected, and the question of its admissibility is to be raised on appeal, so much of it as will enable the court to consider the question intelligently must be preserved in the bill of exceptions. *Schlei v. Struck,* 598

10. A recital in a bill of exceptions that the court "filed its findings and conclusions of law, to which findings and conclusions of law the plaintiff has filed his several exceptions which are made part of the record," is *held* insufficient to identify and incorporate into the bill of exceptions a paper purporting to contain exceptions to said findings, which was filed with the clerk and returned with the record but was not actually inserted in the bill. *Nichols v. Superior,* 643

Review: Questions considered: Waiver.

11. An appeal from a judgment will not bring up for review an order entered denying a motion to set the judgment aside and grant a new trial. *Bank of Commerce v. Elliott,* 648

12. If a judgment be entered upon the verdict of a jury and afterwards upon motion an order be entered setting it aside and granting a new trial unless the party in whose favor the same was entered submits to a specified reduction thereof, and such party does so submit and the judgment is perfected accordingly, such order is an intermediate order as regards such perfected judgment, and is reviewable on appeal from such judgment, under sec. 3070, Stats. 1898. *Hildebrand v. American Fine Art Co.* 171

13. If a party accept a privilege granted to take judgment, upon the theory that all facts warranting a more favorable judgment are established against him, he cannot thereafter change his attitude as to the existence of such facts for the purpose of preventing a review of any question legitimately arising thereon on an appeal from such judgment. *Ibid.*

Same: Demurrer sustained on inconsistent grounds.

14. Where the trial court sustains a demurrer on two inconsistent grounds its action in the premises must stand if the pleading is vulnerable to either objection. *Egaard v. Dahlke,* 366

Same: Questions of fact: Findings of referee. See REFERENCE.

Same: Ambiguous finding construed. See VENDOR AND PURCHASER, 2.

Same: Exceptions: Sufficiency.

15. An omnibus exception to an instruction to the jury which includes several distinct propositions, some of which are correct, is insufficient to present the question as to the correctness of any one of the propositions singly. *Sheppard v. Rosenkrans,* 58

16. A general exception to a finding determining defendant's credits on a mutual account, such credits consisting of ten separate items, one of which was undisputed and a number of them amply supported by the evidence, is not sufficiently specific to be available on appeal. *Bulow v. Hetting,* 682

Affirmance and reversal: Material and immaterial errors. See APPEAL, 1, 2, 4. CRIMINAL LAW, 7. DIVORCE, 2. EVIDENCE, 2. MUNICIPAL CORPORATIONS, 10. SALES, 5. TRIAL, 3–5. PARTNERSHIP, 5.

17. Where an essential fact is established by the undisputed evidence, a failure to include a finding in respect thereto in the special verdict is not prejudicial error. *Trapp v. New Birdsall Co.* 543

Judgment: Direction: Entry below: New trial. See PARTNERSHIP, 5.

18. In an action tried by the court, where there is no finding upon the only controverted question of fact, but there is no doubt where the true preponderance of the evidence is, and no gain can reasonably be expected from another trial, the supreme court, on reversing the judgment, will direct the entry of such judgment as the trial court should have rendered upon the evidence. *Brown v. Griswold,* 275

Costs: When made to abide final result.

19. Where a judgment is reversed and a new trial granted, this court has discretionary power under sec. 2949, Stats. 1898, to direct that the costs taxed in this court in favor of the prevailing party shall

abide the final result in the court below. *Bank of Commerce v. Elliott,* 648

20. Where the amount in controversy, exclusive of costs, is only $3.11 and the party appealing fails to take such proceedings in the court below as will render it probable that in case of a reversal a more favorable judgment will be obtained than before, and a new trial is required, the costs taxed in this court in favor of the prevailing party will be made to abide the final result. *Ibid.*

Appeal from justices' courts. See JUSTICES' COURTS, 1-4.

Appeal from city council. See CONSTITUTIONAL LAW, 7.

APPEALABLE ORDERS. See APPEAL, 1-4.

APPEARANCE.

Want of jurisdiction to enter a judgment by default is not waived by the appearance of defendant solely for the purpose of appealing. *Rockman v. Ackerman,* 639

ARBITRATION AND AWARD.

1. The mistake which can vitiate an award of arbitrators is not a mistaken conclusion upon a question of fact or of law which they considered and decided, but an unconscious failure to know or apprehend some material fact or right, in the light of which their judgment should have been exercised. *Consolidated Water Power Co. v. Nash,* 490

2. Several owners of mill plants and of lands which would be affected by the improvement of the water power of a river agreed to convey their properties to a corporation formed to effect such improvement, and to accept in payment therefor such amount of the stock of said corporation as should be apportioned to each by a board of arbitrators. Construing such contract in the light of the situation and of other facts (more fully stated in the opinion) it is *held* that the apportionment of stock was to be made according to the money values of the various properties, and hence that an apportionment or award based solely upon the proportionate number of feet of fall in the river opposite each of the several properties does not embody any decision of the arbitrators upon the question submitted to them and is not binding. *Ibid.*

3. The parties to said agreement being under no obligation to convey to the corporation until there had been a proper award by the arbitrators, it was error for the court, in an action by the corporation to compel specific performance by one of the parties, to determine the number of shares to which the defendant was entitled, in the light of the evidence as to market values, and to order a conveyance upon delivery of said shares. *Ibid.*

ASSESSMENT. See TAXATION.

ASSIGNMENT.
For benefit of creditors. See BANKS, 12, 13.
Of insurance policies. See HUSBAND AND WIFE, 2, 3.

ATTORNEY GENERAL. See WATERS, 15, 16.

ATTORNEYS AT LAW.

See GARNISHMENT, 2. PARTNERSHIP, 1-5.

1. Where, according to the arrangement between attorney and client, no time was fixed for payment for services except as statements were rendered, interest would not begin to run on such a claim until a demand was made. *Remington v. E. R. Co.* 154

2. An attorney at law is not, merely by reason of his position as an officer of the court, precluded from purchasing a mortgage with the intention of foreclosing it. *McKenna v. Van Blarcom,* 271

BANKRUPTCY.

See ACTION, 5.

1. An order having been made in bankruptcy proceedings in the federal court, directing the trustee under sec. 11b of the bankrupt act to intervene in a suit pending in a state court to which the bankrupt is a party, the latter court will be governed, in deciding an application to permit such intervention, by state laws and judicial policy. *Bank of Commerce v. Elliott,* 648

2. If such an application to intervene is denied, only a party actually aggrieved by the adverse decision can be heard on appeal therefrom; and the trustee cannot be so heard unless he shall have first applied to the state court, failed in his application, and appealed specially from the decision. *Ibid.*

3. A discharge of a debtor in bankruptcy does not extinguish for all purposes a debt upon which it operates, so as to displace the jurisdiction of the state court in a pending action to enforce it. Notwithstanding the discharge, the cause of action to recover the debt continues, unless the bankrupt insists upon his discharge by pleading it in bar of further proceedings in the suit. *Ibid.*

4. If a person is discharged from his debts in bankruptcy, pending a suit against him to recover a debt upon which such discharge operates:

(a) The plaintiff, by leave of court, and before answer setting up the discharge, may discontinue the action without costs, and will generally be permitted to do so;

(b) The suit may proceed to judgment notwithstanding the discharge, if the defendant does not, by a proper proceeding, insist upon it as a defense;

(c) Upon the defendant applying to the court for leave to plead his discharge in bankruptcy, the court may, as terms of granting such application, require a waiver of any costs up to the time of setting up the new defense;

(d) The right to plead the discharge in bankruptcy may be waived by unreasonable delay to the plaintiff's prejudice or by answering without setting up the discharge;

(e) If the defendant pleads his discharge as a defense to the plaintiff's claim, no terms being imposed, the cause will then stand for trial like any other. If the defendant recovers he will be entitled to costs the same as in other cases, and plaintiff will be entitled to costs if he recovers. *Ibid.*

5. If a debt is discharged in bankruptcy pending an action in the state court to recover the same, and there is a lien created by law incident to such debt, a plea in bar of further proceedings in the case

will not preclude the court from rendering such a judgment as may be necessary to enable the plaintiff to enforce the lien, if, notwithstanding the discharge, it is preserved by the bankrupt act. *Ibid.*

6. The interest which the plaintiff in a garnishee action obtains in the property or credits of the defendant, by the due service of a garnishee process upon the person liable to such defendant as a debtor or custodian of his property, is a lien created by law within the meaning of the bankrupt act, and an action pending to recover an indebtedness which has been discharged in bankruptcy, having a garnishee action incidental thereto, will survive the discharge and defense on that ground, so far as to permit a judgment in form against the defendant, enforceable as to the equitable lien secured in the garnishee action. *Ibid.*

BANKS AND BANKING.

Incorporation: Certificate: Signers: Liability of stockholders.

1. The certificate of incorporation of a bank organized under the banking act, upon the recording of which in the office of the register of deeds the signers become a corporation, when filed for record and acted upon must be given full effect, according to its terms, against those who executed it, although such filing may have occurred in contravention of the understanding and directions of some of them; and the obligations thereby incurred by such signers inure to the benefit of all persons dealing with the corporation on the faith of its status as such, though they did not know the names of the incorporators. *Rehbein v. Rahr,* 136

2. The intent of the signers of the certificate of incorporation of a bank, and the force and effect of their act, must be determined from the instrument itself, the terms of which cannot be varied or contradicted by parol nor by inference as to the intent or purpose of those executing it; and any ambiguity in the instrument is to be resolved most strongly against the signers, and so as to give some instead of no effect to their acts. *Ibid.*

3. Subsecs. 18 and 19 of the banking act (sec. 2024, Stats. 1898) provide that "any number of persons may associate . . . and may become incorporated;" that "such persons . . . shall make a certificate," stating the amount and number of shares of the capital stock and the names of the stockholders; and that upon the recording of such certificate they become a corporation. No other provision requires that any given amount of stock shall have been subscribed before the corporation engages in business. *Held,* that those who constitute the original corporation must be the holders of all the stock thereof, and their relationship as such stockholders arises immediately upon the coming into existence of the corporation. *Ibid.*

4. A certificate of incorporation of a bank named "W. R.'s Sons" as the holder of twenty-five shares of stock, and was signed by two of the three sons of W. R. who constituted the firm of W. R.'s Sons. *Held,* that, the firm not being bound thereby, the members signing the certificate became the holders of the twenty-five shares mentioned, the conclusive presumption being that they intended to bind whom they could within the description adopted. *Ibid.*

5. A day or two after the signing of the certificate, one of said signers notified the promoter of the corporation, who held the paper, that

they had reconsidered, and declined and refused to become stockholders, but the promoter nevertheless proceeded to file the certificate bearing their names and stating that W. R.'s Sons held twenty-five shares. Subsequently, when he tendered them a certificate of stock, they refused to accept it, and he took it away, but it was never destroyed, and the officers of the bank, in their reports to the state treasurer, included W. R.'s Sons in the list of stockholders. *Held*, that there had been no effective rescission of the agreement of said signers or termination of their status as stockholders. *Ibid.*

6. Under subsec. 47 of the banking act (providing that the stockholders in every corporation organized thereunder "shall be individually responsible to the amount of their respective share or shares of stock for all its indebtedness and liabilities of every kind"), the individual liability of a stockholder is not, as to creditors, a ratable or proportional liability, but is limited only by the amount of his stock and by the amount of unpaid debts of the corporation. Within those limits it is a primary and absolute liability, upon which any creditor (however small his claim in proportion to the total indebtedness) may sue and recover in full; though to prevent inequality and preference any such creditor must proceed in equity, so that opportunity can be given to all other creditors to share in the fund and the rights of all stockholders to contribution or otherwise may be protected and finally determined. *Ibid.*

Insolvency: Mismanagement: Action against officers: Pleading: Parties.

7. In an action by creditors of an insolvent bank against its officers, a complaint stating a cause of action for the recovery of moneys of the bank negligently dissipated by defendants contained allegations to the effect that false statements as to the solvency of the bank were given out and published by defendants and that plaintiffs relied thereon in making their deposits. *Held*, that the purpose of these allegations was to give a full statement of the acts of the defendants in their management of the bank, rather than to state grounds for recoveries by plaintiffs individually on the ground of deceit, and that there was no misjoinder of causes of action. *Gores v. Field*, 408

8. An allegation, in such case, that "the legal liability of stockholders to contribute to the loss of said corporation has been enforced and paid," does not imply that any *action* to enforce the stockholders' liability has ever been brought. *Ibid.*

9. The complaint also alleged that a certain defendant ceased to be a director of the bank February 23, 1893; that the bank made a voluntary assignment June 1, 1893; that the assignee duly qualified and entered upon his duties, and was still in possession of the assets of the bank; and that the plaintiff did not know the facts until the filing of the inventory, June 21, *1899*. Sec. 1697, Stats. 1898, requires the assignor to file an inventory within twenty days after the assignment, and there was no allegation that such duty had not been performed. *Held*, that the complaint showed on its face that the date June 21, *1899*, was an error, and did not show that the action was commenced more than six years after the cause of action accrued. *Ibid.*

10. Sec. 4252, Stats. 1898 (providing that actions against directors or stockholders of a moneyed corporation or banking association to recover a forfeiture imposed or to enforce a "liability created by law" may be commenced within six years after discovery of the

facts by the aggrieved party), refers to liabilities created by statute law and not to common-law liabilities. *Hurlbut v. Marshall*, 62 Wis. 590, distinguished. *Ibid.*

11. In an action against the officers and directors of a bank to recover for losses sustained by reason of their mismanagement, an allegation in the complaint that "by the negligence and want of ordinary care and diligence on the part of the defendants, *and each of them*, in the discharge of their duties as directors *and managers* of the bank" they permitted and allowed the funds and deposits therein and belonging thereto to be lost and said bank to be made insolvent," is *held* to include the cashier (who was not a director) as one of the delinquent officers, although many of the specific acts charged could ordinarily have been done only by the directors. *Ibid.*

12. In an action by creditors of an insolvent banking corporation, which has made an assignment for the benefit of creditors, to recover from its directors and officers losses sustained by reason of their mismanagement, the assignee is a necessary party, but the corporation, which for all practical purposes has ceased to exist, is not. *Ibid.*

13. In such a case it is not sufficient that the assignee of the corporation is individually a party, but he must be made a party in his official capacity. *Ibid.*

BILL OF EXCEPTIONS. See APPEAL, 6–10.

BILLS AND NOTES.

See CORPORATIONS, 10–13, 16, 17. GUARANTY.

1. Where one person indorses his name upon the back of a blank promissory note and delivers it to another for the accommodation of the latter, to be used in a certain way, and the latter makes material alterations therein and uses it for a different purpose, the indorser will be liable thereon, if, knowing the facts as to the alteration and negotiation of the note, he acknowledges it and promises to pay it, even though such alterations constitute in law a forgery. *Marks v. Schram*, 452

[2. Whether the payee of a note bearing the indorsement of a third person is put upon inquiry as to the maker's authority to use it, by obliteration of the words "after date" and "or order" from the printed form and the substitution of others in their place, doubted but not determined.] *Ibid.*

BOARD OF REVIEW. See TAXATION.

BOARD OF TRADE. See BROKERS. SALES, 15, 16.

BOUNDARIES.

See PUBLIC LANDS.

1. A shortage in the line bounding several lots on one side having been found by a surveyor and by him apportioned between the lots, one lotowner, the plaintiff, set his fence accordingly upon land claimed by defendant, the owner of the adjoining lot, and the latter removed it by force. It appeared that by any theory of apportionment of the shortage the fence was either upon the line between the lots or wholly upon plaintiff's lot. *Held*, that the defendant was guilty of trespass in removing it, but, having acted in good faith, is not liable for punitory damages. *Scheer v. Kriesel*, 125

2. In an action of ejectment involving the location of a boundary line, it is *held*, upon the evidence, to have been for the jury to say whether the fences between the parties were built by agreement and whether either party had by his conduct or by long acquiescence estopped himself, and also to say which of three differing surveys, each of which located the true line on defendant's side of the fence, was correct. *Schlei v. Struck*, 598

3. Evidence as to how a fence on a disputed line agrees with fences in an adjoining section is inadmissible, unless the natural boundaries or monuments and the monuments or stakes set in the course of the original survey cannot be found. *Ibid.*

BROKERS.

See CONTRACTS, 3. SALES, 15, 16.

One who employs a broker to make a sale for him on a board of trade impliedly submits himself to the lawful rules of such board. *Bartlett v. Collins*, 477

BUILDING CONTRACTS.

A stipulation in a building contract that "no extras will be allowed unless ordered by the owner in writing," is waived by the owner requesting a subcontractor to do certain extra work and personally supervising it during its progress. *Wambold v. Gehring*, 122

BURDEN OF PROOF. See HUSBAND AND WIFE, 5. PRESUMPTIONS. SALES, 3, 15, 16.

BURGLARY. See CRIMINAL LAW, 10.

CASES DISTINGUISHED, ETC.

1. *Barnard v. Backhaus*, 52 Wis. 593 (as to gaming contract), followed. *Bartlett v. Collins*. 478, 483–4

2. *Benware v. Pine Valley*, 53 Wis. 527. See No. 36.

3. *Carmody v. Mulrooney*, 87 Wis. 552; *Wilkins v. Nicolai*, 99 Wis. 178 (as to adverse possession), distinguished. *Frye v. Highland*, 298

4. *Carroll v. C., B. & N. R. Co.* 99 Wis. 399. See No. 9.

5. *Cathcart v. Comstock*, 56 Wis. 590. See No. 43.

6. *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614. See No. 43.

7. *Collins v. Cowan*, 52 Wis. 634; *Shafer v. Hogue*, 70 Wis. 392 (as to nature of lien actions), distinguished and remarks limited. *Reindl v. Heath*, 571, 572

8. *Coorsen v. Ziehl*, 103 Wis. 381 (as to "extras"), distinguished. *Wambold v. Gehring*, 124

9. *Cummings v. Nat. F. Co.* 60 Wis. 603; *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225; *Carroll v. C., B. & N. R. Co.* 99 Wis. 399 (as to presumption of negligence), distinguished. *Beyersdorf v. Cream City S. & D. Co.* 463

10. *Davis v. Scott*, 59 Wis. 604. See No. 23.

11. *Douglass v. State*, 4 Wis. 387 (as to nuisances: prescriptive rights), distinguished. *Charnley v. Shawano W. P. & R. I. Co.* 568

12. *Eldred, In re*, 46 Wis. 548 (as to district in which offense is committed),—a doubt *held* unfounded. *State v. McDonald*, 515

13. *Fairchild v. Dean*, 13 Wis. 329. See No. 31.

14. *French v. State*, 85 Wis. 400 (as to presence of accused), distinguished. *Hughes v. State*, 405

15. *Hill v. Fond du Lac*, 56 Wis. 244. See No. 36.

16. *Hoffman v. Maffioli*, 104 Wis. 630; *Teipel v. Meyer*, 106 Wis. 41 (as to mutuality of contract), distinguished. *Woodward v. Smith*, 610

17. *Hurlbut v. Marshall*, 62 Wis. 590 (as to liability created by law), distinguished. *Gores v. Field*, 409, 417

18. *Kelley v. Madison*, 43 Wis. 638. See No. 36.

19. *Kennedy v. Waugh*, 23 Wis. 468. See No. 31.

20. *Landon v. Burke*, 33 Wis. 452. See No. 31.

21. *Lawton v. Waite*, 103 Wis. 244. See No. 43.

22. *Lillie v. Dunbar*, 62 Wis. 198 (as to sale of timber), distinguished. *Mississippi R. L. Co. v. Miller*, 87–89

23. *Mappes v. Iowa Co.* 47 Wis. 31; *Davis v. Scott*, 59 Wis. 604 (as to paupers), overruled. *Patrick v. Baldwin*, 346, 347, 351

24. *Mathers v. Union M. A. Asso.* 78 Wis. 588 (as to insurance contract), overruled in part. *Chamberlain v. Prudential Ins. Co.* 4, 8

25. *McCown v. Russell*, 84 Wis. 122 (as to garnishment), distinguished. *Grimsrud v. Linley*, 635

26. *Paine L. Co. v. Oshkosh*, 89 Wis. 449; *Reuter v. Lawe*, 94 Wis. 300 (as to estoppel), distinguished. *Davis v. Appleton*, 588

27. *Reuter v. Lawe*, 94 Wis. 300. See No. 26.

28. *Rolette v. Rolette*, 1 Pin. 370 (as to separation agreement), distinguished and limited. *Baum v. Baum*, 51, 56

29. *Ryan v. C. & N. W. R. Co.* 101 Wis. 506. See No. 36.

30. *Shafer v. Hogue*, 70 Wis. 392. See No. 7.

31. *Spensley v. Janesville C. M. Co.* 62 Wis. 549; *Kennedy v. Waugh*, 23 Wis. 468; *Landon v. Burke*, 33 Wis. 452; *Fairchild v. Dean*, 13 Wis. 329 (as to appeal from discretionary order), disapproved. *McElroy v. Minn. P. H. Co.* 119, 120

32. *Stacy v. M., L. S. & W. R. Co.* 85 Wis. 225. See No. 9.

33. *State v. Douglas*, 26 Wis. 428 (as to term of office), distinguished. *O'Connor v. Fond du Lac*, 269

34. *State v. Gillen*, 49 Wis. 683 (as to penalties: complaint), distinguished. *State v. Childs*, 237

35. *State ex rel. Covenant M. B. Asso. v. Root*, 83 Wis. 667 (as to exercise of original jurisdiction of supreme court), disapproved. *In re Court of Honor*, 628–630

36. *Stocks v. Sheboygan*, 42 Wis. 315; *Hill v. Fond du Lac*, 56 Wis. 244; *Kelley v. Madison*, 43 Wis. 638 (as to condition precedent), distinguished. *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226; *Ryan v. C. & N. W. R. Co.* 101 Wis. 506, disapproved. *Benware v. Pine Valley*, 53 Wis. 527, criticised. *O'Connor v. Fond du Lac*, 258–260

37. *Teipel v. Meyer*, 106 Wis. 41. See No. 16.

38. *Thompson v. Milwaukee*, 69 Wis. 492. See No. 43.

39. *Two Rivers Mfg. Co. v. Beyer*, 74 Wis. 210 (as to judgment for costs), distinguished. *Bank of Commerce v. Elliott*, 664

40. *Ward v. C., St. P., M. & O. R. Co.* 85 Wis. 601 (as to duty of person crossing railway),—a remark overruled, and an expression criticised. *Guhl v. Whitcomb*, 69, 73, 74

41. *Weed & G. Mfg. Co. v. Whitcomb*, 101 Wis. 226. See No. 36.

42. *Wilkins v. Nicolai*, 99 Wis. 178. See No. 3.

43. *Zitske v. Goldberg*, 38 Wis. 217; *Cathcart v. Comstock*, 56 Wis. 590; *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614; *Thompson v. Milwaukee*, 69 Wis. 492 (as to general and local laws), overruled. *Lawton v. Waite*, 103 Wis. 244, explained. *Milwaukee Co. v. Isenring*, 14–18

CERTIORARI.

A return to a writ of *certiorari* imports complete and absolute verity so far as it is responsive to the writ; and neither the allegations of the petition nor of the writ can serve to supply other facts merely because they are not traversed or otherwise met by the return. *State ex rel. Heller v. Fuldner*, 56

CHAMPERTY. See ATTORNEYS AT LAW, 2.

CITIES. See MUNICIPAL CORPORATIONS.

CLAIMS. See CONSTITUTIONAL LAW. 7. EXECUTORS AND ADMINISTRATORS. MUNICIPAL CORPORATIONS, 19, 20.

CLERICAL ERROR. See BANKS, 9.

COLLATERAL SECURITY. See CORPORATIONS, 10.

COLOR OF TITLE. See ADVERSE POSSESSION, 4, 5.

COMMON LAW. See STATUTES, 3.

COMMON SCHOOLS. See SCHOOLS.

COMPROMISE AND SETTLEMENT. See PARTNERSHIP, 1–5.

CONDITIONAL SALES. See LOGS AND LOGGING.

CONDITIONS precedent. See ACTION, 1–3. LIMITATION OF ACTIONS, 1. MUNICIPAL CORPORATIONS, 19, 20.

CONFLICT OF LAWS. See CONTRACTS, 2–4.

CONSIDERATION. See CONTRACTS, 8. HUSBAND AND WIFE, 2. INSURANCE, 1.

CONSPIRACY.

1. In a civil action for damages instituted against members of a conspiracy, the gist of the action is the damage; while in a criminal prosecution for the offense of conspiring, the gist of the action is the conspiracy. *Martens v. Reilly*, 464

2. A conspiracy is defined to be a combination of two or more persons to do a criminal or unlawful act, or to do a lawful act by criminal or unlawful means. *Ibid.*

3. If the object to be attained by a conspiracy be criminal or unlawful, the combination offends against the criminal law by common-law rules without any overt act, and by statute when there is such overt act. (Stats. 1898, sec. 4568. But see secs. 4466*a* and 4466*b*, pertaining to the statutory conspiracies.) And if the means to be used are criminal or unlawful, the ultimate end to be attained need not be essentially wrong. In either case if damage is produced to the person against whom the conspiracy is directed, an action to recover the same will accrue to him against all the guilty parties. *Ibid.*

4. The gist of the civil action against conspirators being the damage, the general rule is that it will not lie against many acting in con-

cert if it will not lie against one of them for the same act. Such rule does not apply to criminal actions. *Ibid.*

5. The violation of a contract is an unlawful act. Therefore, if one or more persons conspire with another to commit, or two or more persons combine together to effect, such violation, and the object of the combination be consummated to the damage of a third person, such third person has his action to recover the damages against him who breached the contract and every person who, by reason of the combination, is connected with the wrong. *Ibid.*

CONSTABLES. See LANDLORD AND TENANT, 3–7.

CONSTITUTIONAL LAW.

General and special or local laws.

1. A law is "general" in the broad sense of the term if it extends to the whole state or the whole of a legislative class of localities legitimately created for the purposes of general legislation. *Milwaukee County v. Isenring,* 9

2. A law is "general" in the restricted sense of the term, as it is used in sec. 21, art. VII, Const., not only when it is general in the broad sense thereof, but also when it is of that character in the sense of being public. But if it applies only to a single subdivision of the state, as a county, town, city, or village, or a collection of such localities not constituting a legitimate class thereof for the purposes of legislation, it is local in character. Where a law is public and general in the sense indicated the two terms are synonymous. *Ibid.*

3. If a law be general merely because it is public and not in the broad sense above indicated, it is local and special, and must be tested as to its validity by sec. 18, art. IV, Const., and sec. 21, art. VII, as well; and if it belong to one of the prohibited classes of special legislation, it must be further tested by the constitutional restriction on that subject. *Ibid.*

Uniformity of county government: Sheriffs: Salaries.

4. Whether an act specially designed to make the offices of sheriff, undersheriff, and deputy sheriff in a single county salaried offices violates sec. 23, art. IV, Const., in regard to there being but one system of county government affecting the whole state, and that such system shall be as uniform as practicable, doubted, but the point is not decided. *Ibid*

Courts: Justices of the peace. See JUSTICES' COURTS, 5.

Local self-government: Police officers: Election, etc. See MUNICIPAL CORPORATIONS, 1–6.

Impairing obligation of contracts: Change in remedies.

5. A law does not impair the obligation of a contract, within the meaning of sec. 12, art. I, Const., if neither party is relieved thereby from performing anything of that which he obligated himself to do; but if either is absolved from performing any of those things such obligation is impaired, whether the absolution is accomplished directly and expressly or indirectly and only as a result of some modifications of the legal proceedings for enforcement. *Oshkosh W. W. Co. v. Oshkosh,* 208

6. It is not an impairment of the obligation of a contract to make the remedy dependent for certain steps upon the performance by public officers of their duties. *Ibid.*

7. Except that its charter provided that moneys should be drawn out only upon the order of the mayor and clerk, duly authorized by the council, and that the council might require any claim to be verified by affidavit, a city, at the time a contract was made with it, was subject to suits upon contract liability like any other person or corporation. A subsequent amendment of the charter, adopted in good faith and with no legislative purpose to defeat or embarrass the collection of just claims, providing that no action should be maintained upon any claim or demand until after it had been presented to and disallowed in whole or in part by the council (failure to pass upon a claim within sixty days being deemed a disallowance thereof), and that a disallowance should be a bar to any action unless an appeal therefrom was taken within twenty days, is *held* not to impair the obligation of the contract although it involved a change in the remedy in the following particulars: (1) service of notice of appeal was to be made upon the clerk in lieu of service of summons upon the mayor; (2) the various steps preliminary to getting the matter into court became jurisdictional and could not be waived or jurisdiction conferred by the city officers: (3) a failure to obtain judgment by reason of errors in procedure or lack of proof, which before would have resulted only in nonsuit, would leave the claimant barred of his claim; (4) a suspension of the right to sue, resulting incidentally from the requirement as to presentation and disallowance of claims; (5) the claimant on appealing was required to give a bond for costs which must be approved by the city attorney and comptroller, and which could not be amended, so that a mistake therein would be fatal to the cause of action. *Ibid.*

Place of trial in criminal cases: "District."

8. Sec. 8, Stats. 1898 (giving to the counties bordering on the shores of Green Bay jurisdiction in common of all offenses committed on that part of said Green Bay which lies within the limits of this state), is not in violation of sec. 7, art. I, Const., providing that in all criminal prosecutions by indictment or information the accused shall enjoy the right to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law. *State v. McDonald,* 506

CONTRACTS.

See ARBITRATION, 2, 3. BILLS AND NOTES. BROKERS. BUILDING CONTRACTS. CONSPIRACY, 5. CONSTITUTIONAL LAW, 5–7. CORPORATIONS, 6–18. DEEDS. EVIDENCE, 4, 5. GUARANTY. HUSBAND AND WIFE, 1–5. INSURANCE. LIENS, 2. LOGS AND LOGGING. MASTER AND SERVANT, 1–7. MUNICIPAL CORPORATIONS, 14. PAUPERS, 2–4. SALES.

1. In an action to recover damages for breach of a contract to purchase show cards to be used as advertising matter, it appeared that, after some work upon the design for the cards had been done and approved, the defendant corporation had succeeded to the business of the partnership which had agreed to purchase the cards; that the president of the corporation, upon being shown the correspondence with the partnership and the sketches and proofs of the cards, stated to plaintiff's agent that not later than the next spring he would "take up the matter of the show card proposition and use them at that time;" and that plaintiff did nothing further on the cards until spring, when it opened up negotiations with defendant,

but the latter then refused to recognize any liability to plaintiff. *Held*, that no contract between plaintiff and defendant was shown. *Beck & Pauli L. Co. v. Nebraska City Cereal Mills*, 65

2. If a personal contract is to be performed partly where made and partly in other countries or states, the law of the place where it is made will govern, unless a clear mutual intention is manifested that it shall be governed by the law of some other country. *Bartlett v. Collins*, 477

3. A contract, made in this state between residents thereof, by which one employed the other, a broker, to sell wheat for him in Chicago and agreed to pay a commission for such service and to indemnify the broker against loss, is governed by the law of this state. *Ibid.*

4. The courts of this state will not hold valid any contract which is injurious to the public rights of its people, offends their morals, contravenes their policy, or violates public law. *Ibid.*

5. Where a contract provides that it shall not be binding upon either or any of the parties thereto until signed and executed by persons and corporations named therein, any party has an option to withdraw before the contract has been signed and executed by all of such persons and corporations, and may effectively exercise such option by notifying all the parties interested of his refusal to be bound by the contract or to participate further in the scheme contemplated thereby. *Consolidated W. P. Co. v. Nash*, 490

6. Where one of the signatures required by the terms of such contract before it shall take effect is that of "C. as administrator of the estate of B.," signature by C. in that form is sufficient, and an authoritative execution on behalf of the estate of B. is not necessary to make the contract effective. [Whether, however, there is thus created sufficient mutuality of effective obligation to warrant the compelling of specific performance, not determined.] *Ibid.*

7. Where the names of certain corporations had been signed to such a contract without authority, ratification of such signatures by the stockholders of the corporations after one party had exercised his option to withdraw could not affect the latter or create any liability against him. *Ibid.*

8. In an action upon an order for the payment of money out of a specified fund, brought by an indorsee against the drawer, the defendant's evidence tended to prove that the order was given as part payment on a contract with the payees by which they were to drill for defendant, at specified prices per foot, until a flowing well was obtained or they were ordered to stop — payment to be made when the work was completed; that the plaintiff knew of the contract and induced defendant to give the order by fraudulently representing that, if it were given, he would furnish the payees the necessary material to complete their contract; and that after said order was given the plaintiff refused to furnish said material and the payees stopped drilling, although they had not obtained a flowing well and were not ordered to stop. *Held*, that the question whether the consideration for the order failed should have been submitted to the jury. *Woodward v. Smith*, 607

9. A contract with well-drillers by which they were to drill until a flowing well was obtained or they were ordered to stop, at fixed prices per foot depending on the distance drilled, is not void for want of mutuality. *Ibid.*

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 11, 12. RAILROADS.

CONVEYANCES. See ADVERSE POSSESSION, 4, 5. ARBITRATION, 2, 3. DEEDS. EQUITY. HUSBAND AND WIFE, 5. LOGS AND LOGGING. WATERS, 14.

CORPORATIONS.

Organization: Payment for stock by conveyance of property.

1. A corporation was organized for the development of a tract of land, with a capital stock of 10,000 shares of $100 each, M. subscribing for 9,996 shares. At a meeting of the directors a resolution was adopted that the company negotiate with M. for the purchase of said tract at a price not exceeding $1,000,000, payable in stock. Two weeks later M. conveyed the property to the corporation, subject to the incumbrances, for a recited consideration of $700.000. M. had shortly before purchased the land by giving a mortgage for $44,000 on it and assuming prior mortgages and liens, and it appeared that it was mortgaged for its full value. There was nothing to show that there were any negotiations under said resolution, or that the conveyance was received as a payment on stock. *Held*, that it could not be assumed that said $700.000 was a payment of seventy per cent. of the stock of the corporation. *Heinze v. South Green Bay L. & D. Co.* 99

Incorporation of bank: Certificate: Signature. See BANKS, 1-5.

Formation of corporation to improve water power: Agreement to convey mills: Apportionment of stock. See ARBITRATION, 2, 3.

Transacting business before authorized: Personal liability of stockholders. See CORPORATIONS, 7-9.

2. The personal liability of stockholders in a corporation upon obligations incurred before it was authorized to transact business with others than its members is governed by the statute in force when such obligations were incurred. *Heinze v. South Green Bay L. & D. Co.* 99

3. In an action to enforce the personal liability of stockholders under sec. 1773, S. & B. Ann. Stats., defendants who had subscribed for stock in the corporation, accepted office in it, and assumed to act as directors in the transaction of corporate business cannot deny that they were stockholders. *Ibid.*

4. In an action to enforce the personal liability of stockholders in a corporation, under sec. 1773, S. & B. Ann. Stats., the fact that a defendant had signed the original subscription list for stock, together with his admission that he was a stockholder and acted as president of the corporation at a date subsequent to the making of plaintiff's contract, is *held* sufficient, at least, to justify the submission to the jury of the question whether he was a stockholder at the time said obligation was incurred. *Ibid.*

Individual liability of stockholders for debts. See BANKS, 6.

Officers: Election: Estoppel: Contracts; Authority: Personal liability of stockholders.

5. Where one of the subscribers to stock was elected president at a meeting of certain of the signers of the articles of incorporation who had elected themselves directors, and such person acted as president with the knowledge of, and upon direct authority conferred by, the board, his title to the office cannot be tried in a collateral proceeding; and the persons who assisted in his election, and who have since acted with him, are estopped, as against third

parties, from questioning his title to the office. *Heinze v. South Green Bay L. & D. Co.* 99

6. Where a person has been elected president of a corporation by a *de facto* board of directors, and, by a by-law, has been given general supervision of its entire business and authority to sign all contracts, the corporation is bound by a contract made by him in its name with a third person, which is directly in line with the general purpose and course of business of the corporation, and necessary in order to fully carry out the corporate purpose. *Ibid.*

7. After the organization of a corporation to develop a tract of land in the neighborhood of a city, a surveyor came to the directors with a letter of introduction from the president, and as officers they directed his operations in platting the land, a work which was necessary to carry out the purpose of the corporation. In an action by him under sec. 1773, S. & B. Ann. Stats., to enforce the personal liability of the stockholders for his services, *held*, that the directors were estopped to deny knowledge of the contract, executed by the president in the name of the corporation, under which the surveyor performed the work. *Ibid.*

8. The fact that the directors had a secret agreement with the president that no corporate liability should be incurred until he had provided funds sufficient to pay, would not relieve them from personal liability. *Ibid.*

9. The personal liability of stockholders in such a case does not depend upon knowledge or acquiescence by the individual stockholder, but rather upon his relation to the corporation. *Ibid.*

Same: Duties: Right to purchase obligations of corporation for personal benefit.

10. Certain guarantors of the notes of a corporation had pledged stock in the corporation and an interest in a partnership as collateral security for said notes and also for their individual indebtedness to the pledgee. The president of the corporation, who was also one of the guarantors of said notes and who had an interest in said partnership, purchased for himself, from the pledgee, said corporate notes and also the pledged collaterals, for less than their true value. The corporation was a going concern, but was embarrassed for want of ready money and unable to pay its debts as they matured. It was alleged that the president made no effort to purchase the corporate notes and collaterals for the benefit of the corporation, although he knew such a purchase would greatly benefit the corporation and all its stockholders, but purchased for himself without the consent of any of the other stockholders. It did not appear that the corporation had any legal right to have the collaterals remain pledged for the security of its debt. *Held*, that the purchase of such collaterals by the president of the corporation did not in any way conflict with any duty he owed to it, and it had no enforceable interest therein. *Glenwood Mfg. Co. v. Syme*, 355

11. An officer and director of a going corporation may purchase its outstanding obligations at a discount, for his own benefit, and enforce them in full, where he owes no duty to the corporation, inconsistent with such purchase, to act for its benefit. *Ibid.*

12. Where the corporation has not been called upon to pay anything upon its notes so purchased by one of its officers, and notes given by it in renewal of the notes purchased are still held by the heirs of such officer, its rights in respect thereto can be protected in an

action brought to enforce the notes, in defense of a recovery thereon, and equitable relief is unnecessary. *Ibid.*

13. Where in such a case a considerable time has elapsed since the purchase of the notes and since the death of the purchaser, a complaint asking equitable relief in respect thereto should excuse the delay by showing that prompt action was taken upon discovery of the facts. *Ibid.*

Same: Powers: Sale of entire property.

14. The president and secretary of an active manufacturing or business corporation have no power to make a contract on its behalf for the conveyance of its entire operating plant, without the sanction of the stockholders in meeting assembled, especially when the contract is also to subscribe for, and accept payment in, the stock of another corporation. *Consolidated W. P. Co. v. Nash,* 490

Same: Apparent authority to contract: Promissory notes.

15. If a person, acting in good faith, contract with a corporation upon the strength of the apparent authority of those acting in its behalf, and the corporation receive the benefit of the contract, it is bound, regardless of whether its agents had actual authority in the premises or the contract was within the scope of its corporate powers. *Bullen v. Milwaukee Trading Co.* 41

16. If the officers of a corporation, who, customarily, are empowered to act in its behalf, execute a promissory note in its name, and cause such execution to be authenticated by the corporate seal, the presence of such seal upon the instrument carries with it *prima facie* proof of authority in fact to execute the paper. *Ibid.*

17. If a corporation, by its officers having apparent authority to do so, execute an instrument in the form of a promissory note, cause the same to be indorsed by the payee, transfer it to a third person, taking therefor a check payable to the order of the treasurer of the corporation,—which check is delivered to such treasurer as the proper custodian of corporate property of that kind,—and the check is duly presented for payment and paid, the proceeds of the note must be regarded as having reached the corporation, regardless of whether its officers had actual authority in the matter or not, or what subsequently became of such proceeds. *Ibid.*

Same: Unauthorized contract: Ratification. See CONTRACTS, 7.

Same: Liability for mismanagement. See BANKS, 7–13.

Ultra vires. See WATERS, 14.

Succession: Contracts: Setoff.

18. Where one corporation has purchased the business of another, a person who purchases goods belonging to the successor corporation cannot, in an action by it for the purchase price, set off damages arising from breach of a contract between him and the original corporation, in the absence of evidence that the plaintiff became a party to that contract by assignment or otherwise. *Computing Scale Co. v. Churchill,* 303

Insolvency. See BANKS.

COSTS. See ACTION, 4, 5. APPEAL, 19, 20. BANKRUPTCY, 4. GARNISHMENT, 3. WILLS, 4.

COUNTIES: Uniformity in government. See CONSTITUTIONAL LAW, 4.

COURT AND JURY. See ADVERSE POSSESSION, 10–12. APPEAL, 6, 17. BOUNDARIES, 2. CORPORATIONS, 4. HIGHWAYS, 3, 4. SALES, 6. TRIAL, 8.

COURTS. See BANKRUPTCY, 1–3. JUSTICES' COURTS. SUPREME COURT.
COVENANTS. See DEEDS, 1–3.
CREDITORS' REMEDIES. See BANKRUPTCY. BANKS. CONSTITUTIONAL LAW, 5–7. CORPORATIONS, 2–4, 7–9. GARNISHMENT. LIENS.

CRIMINAL LAW AND PRACTICE.

See CONSPIRACY. CONSTITUTIONAL LAW, 8.

1. In a prosecution for the murder of a woman who was an inmate of a house of ill fame, a juror, when examined upon the *voir dire*, stated that he lived about two blocks from the saloon where the shooting occurred, and that he had read about the matter in the newspapers and heard some discussion about it, but had not formed an opinion, and thought he could try the case fairly. During the trial the attorney for the accused informed the court that said juror had been in said saloon soon after the crime was committed. Thereupon the court examined him and he admitted having been in the saloon as stated, but denied having learned anything in particular about the case. No question concerning his presence in the saloon as stated was put to him upon the *voir dire*. Upon motion for a new trial affidavits were introduced tending to show that said juror was a frequenter of the disreputable house where the deceased lived; that he knew and was intimate with her; that he had stated soon after the shooting that the man who did it ought to be sent over the road; and that he was in the room where the shooting occurred while the body of the deceased still lay upon the floor. The juror admitted that he was in the saloon building as stated and that he had been at said disreputable house, but denied having been in said room or having known the deceased. *Held*, sufficient to support the conclusion of the trial judge that the juror was competent. *Hughes v. State*, 397

2. A verdict in a criminal case cannot be impeached by anything a juror says or does after its rendition. *Ibid.*

3. A person summoned as talesman is not disqualified by sec. 2525, Stats. 1898, from serving as a juror, by reason of having served upon the regular panel of a court of record in the same county within a year. *Ibid.*

4. The fact that a person who has read about a crime in the newspapers states that, assuming the facts stated therein to be true, he has formed an opinion which would require evidence to remove, does not disqualify him from serving as a juror, if, notwithstanding said opinion, he thinks he can dismiss the impression and stand perfectly fair to the accused upon the evidence. *Ibid.*

5. Questions which practically ask a juryman what he would or would not do under a supposed state of facts may properly be ruled out. *Ibid.*

6. Where a person has a legal residence in the state, his statement upon examination as a juror that he has no *home* here, but lives at a hotel and is temporarily absent from the state a large part of the time, does not disqualify him. *Ibid.*

7. Although twelve unchallenged jurors and no more should be in the box at all times while the jury are being examined, a failure in that regard does not constitute a material error, where it affirmatively appears that the error was corrected when attention was called to it, and that in the meantime nothing had been done except examine a juror without objection. *Ibid.*

8. In a prosecution for murder evidence that on the day when the deceased made a statement tending to show that the killing was intentional, and prior to the time it was made, the deceased, although at times in a stupor, apparently understood what she was talking about, and conversed with others than the person to whom the statement was made concerning other matters requiring the exercise of memory and intelligence, stating to one person that she knew she could not get well and could not live long, is *held* sufficient foundation for the reception of said statement as a dying declaration; and the testimony of other witnesses that on said day the deceased was delirious and did not know what she was doing affects only the credibility of the statement. *Ibid.*

9. The record on a trial for murder extending over several days affirmatively showed that the accused was present at the time of arraignment and plea, and at the opening of court, both forenoon and afternoon, on each day of the trial, up to and including the morning session at which the jury were charged and retired, and that he was present during the afternoon session of that day, both when the jury came in with a request for further instructions, and afterwards when such instructions were given. It also showed, under all reasonable inferences, that the jury came in and rendered their verdict during the same afternoon session, and only a few minutes after receiving such additional charge. *Held*, a sufficient showing that the accused was present at the time the verdict was rendered. *Ibid.*

10. Upon a motion for a new trial, made by a defendant who, on the day after his arrest, had pleaded guilty to an information for burglary, it was urged that he was only eighteen years old, simple-minded and foolish, and was intoxicated when he broke and entered the building; that he had no lawyer to advise him, and no relative or friend to counsel with, but was advised, coaxed, and threatened by the police officers to plead guilty. Upon the evidence, however, adduced before the trial court upon the hearing of the motion, it is *held* that it was not made to appear that justice had not been done, and that there was no abuse of discretion in denying the motion. *Fitzgerald v. State*, 677

CROSS-EXAMINATION. See WITNESSES, 2.

DAMAGES.

See BOUNDARIES, 1. LANDLORD AND TENANT, 6, 7. MASTER AND SERVANT, 6, 7. MUNICIPAL CORPORATIONS, 14. NEGLIGENCE. SALES, 4-6, 14.

Where the jury were erroneously allowed to include in their verdict damages for interruption of business, and the amount awarded therefor was not specified, the error cannot be cured by allowing plaintiff to remit a portion of the verdict. *McCann v. Ullman*, 574

DEATH caused by negligence. See NEGLIGENCE.

DEBTOR AND CREDITOR. See BANKRUPTCY. BANKS. CONSTITUTIONAL LAW, 5-7. CORPORATIONS, 2-4, 7-9. GARNISHMENT. LIENS.

DECEIT. See BANKS AND BANKING, 7.

DEDICATION. See HIGHWAYS, 2.

DEEDS.

See ADVERSE POSSESSION, 4, 5. EQUITY. HUSBAND AND WIFE, 5. WATERS, 14.

1. Covenants run only with the legal title to lands and tenements. *Wallace v. Pereles*, 316
2. Where a grantor of land has no title and no possession, and his grantee does not take immediate possession, the covenants of the grantor are personal to the grantee, and are not transmitted to subsequent grantees by a mere conveyance of the land. [Whether entry by the grantee into possession of the land immediately after delivery of the deed would be sufficient to carry the covenants, not determined.] *Ibid.*
3. A judgment establishing a paramount right to land as against the person in possession claiming title under a warranty deed is not *prima facie* evidence of the existence of a paramount title, or of eviction thereby, as against the defendant's covenantor, who was not a party to the action and to whom no notice of it was given until after rendition of the judgment. *Ibid.*
4. To justify a finding against the execution, according to its terms, of a formal conveyance, duly acknowledged, the evidence must be perfectly clear, convincing, and satisfactory, establishing the fact beyond all reasonable controversy. *Linde v. Gudden*, 326
5. The testimony of a party to a deed, who would overturn it, that she did not execute it, is insufficient to overcome the force of apparent execution and of the official certificate of acknowledgment, even though there is other testimony tending to show that her signature was not upon the instrument at the time it was subscribed by the witnesses, some days prior to the date of the acknowledgment. *Ibid.*
6. A conveyance of a lot "according to" a certain map cannot be held to cover an adjoining strip which, according to said map, is not a part of said lot but is a part of the street. *Davis v. Appleton*, 580

DE FACTO OFFICERS. See JUSTICES' COURTS, 5.

DEFAULT. See APPEARANCE. JUDGMENT, 2. VENDOR AND PURCHASER, 4, 5.

DEFINITIONS. See WORDS AND PHRASES.

DELAY. See CORPORATIONS, 13. EQUITY, 4.

DEMAND. See SCHOOLS, 4 (4).

DEMURRER. See ACTION, 2, 8. APPEAL, 14. FORFEITURES, 2. JUDGMENT, 1. MUNICIPAL CORPORATIONS, 13.

DESCENT AND DISTRIBUTION. See EXECUTORS. WILLS.

DISCONTINUANCE. See ACTION, 4, 5.

DISCRETION. See APPEAL, 1, 2, 4. CRIMINAL LAW, 10.

DISSEISIN. See ADVERSE POSSESSION, 2, 11, 12.

DIVORCE.

1. In an action by a wife for divorce on the ground of cruel and inhuman treatment it appeared that the net amount of property of the parties, over and above indebtedness, was $17,100, much of which had been accumulated in a business which the plaintiff had assisted in managing. Out of this the court awarded her $3,000,

apparently in repayment of $1,500 put into the business by her several years previously, the homestead, worth $6,000, and her interest as beneficiary in an insurance policy worth $500. It also provided for the payment to her of $150 annually during the minority of an eight-year-old son whose custody had been awarded to her. *Held*, that the plaintiff had no just ground of complaint. *Hoernig v. Hoernig*, 229

2. Where adultery was not alleged in the complaint in a divorce action, but facts from which, if true, a strong inference of adultery would arise were stated simply as acts of cruel and inhuman treatment, the court refused to find specifically as to such acts, but found generally that cruel and inhuman treatment was proven. *Held*, not prejudicial to plaintiff. *Ibid.*

DOCKETING judgment. See JUDGMENT, 3, 4.

DOMICILE. See CRIMINAL LAW, 6. PAUPERS.

DUPLICITY in pleading. See FORFEITURES, 2.

DYING DECLARATIONS. See CRIMINAL LAW, 8.

EJECTMENT. See WATERS, 6.

ELECTION.
Between branches of statute. See FORFEITURES, 2.
Between inconsistent claims. See SALES, 7, 8.
Of officers. See CORPORATIONS, 5. JUSTICES' COURTS, 5. SCHOOLS, 1, 2.

EMINENT DOMAIN. See WATERS, 17, 18.

ENTIRE CONTRACT. See MASTER AND SERVANT, 1–7.

EQUITY.

See ARBITRATION. BANKS, 6. CORPORATIONS, 12, 13. DIVORCE. GUARANTY. MORTGAGES. MUNICIPAL CORPORATIONS, 20. PARTNERSHIP, 5. SCHOOLS, 4. VENDOR AND PURCHASER, 3–5. WATERS, 15, 16. WILLS, 2–4.

1. In an action by persons claiming to be the equitable owners of land to compel a conveyance thereof to them the evidence is *held* to sustain a finding of the trial court that the entire purchase price had been paid by one of the defendants, in whose name the deed was taken, and that he did not hold the land in trust for the person under whom the plaintiffs claim. *Havenor v. Pipher*, 108

2. In such a case, even if the deed to said defendant was in fact a mortgage to secure advances, a conveyance would not be compelled without repayment of such advances. *Ibid.*

3. Sec. 2077, Stats. 1898, would seem to be fatal to any claim that the title was held by said defendant in trust, whatever was the fact as to the payment of the consideration. *Ibid.*

4. A delay of twenty-three years after the title was vested in said defendant, before the bringing of an action to compel a conveyance, during all of which time his son (the person alleged to have been the equitable owner and under whom plaintiffs claimed by descent) was *sui juris* and cognizant of all the facts, and not only did not question, but by affirmative acts constantly recognized, his father's ownership, is *held* to bar the action on the ground of laches. *Ibid.*

ESTATES OF DECEDENTS. See CONTRACTS, 6. EXECUTORS. WILLS.

ESTOPPEL.

See BOUNDARIES, 2. CORPORATIONS, 3, 5, 7. LOGS AND LOGGING, 2–5. MORTGAGES. MUNICIPAL CORPORATIONS, 9, 15. WATERS, 17.

Where an estoppel is relied upon as a defense it must be pleaded. *Chippewa Falls v. Hopkins,* 611

EVIDENCE.

See APPEAL, 9. BANKS, 2. BOUNDARIES, 3. CORPORATIONS, 4. CRIMINAL LAW, 8. DEEDS, 4, 5. HIGHWAYS, 5. INSURANCE, 1. SALES, 1–3, 15, 16. STATUTES, 1. TRIAL, 1, 2. WITNESSES.

1. The admission in evidence of photographs showing rear views of the person of the plaintiff, a young lady, nude from below the shoulders to mid-thigh, was grossly improper. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. *Guhl v. Whitcomb,* 69

2. In an action to recover the contract price of a heating plant, when defendant was asked to state its value, the court expressed a doubt as to his competency to give an opinion, he not being shown to be an expert. Thereupon he was asked whether as a heating apparatus it had any value to him, and he replied that it had no value to him for any purpose. *Held,* that there was no error prejudicial to defendant. *Martin v. Eastman,* 286

3. The statement of a witness who had testified to a conversation in his presence between the parties, that he had been under an impression, at some time, that he heard the plaintiff or the defendant say that a certain sum had been paid on the contract in suit, is too indefinite to render its exclusion error. *Ibid.*

4. Where a party has pleaded a written contarct and its performance, he is not entitled to introduce evidence of an oral modification thereof which was not pleaded. *Computing Scale Co. v. Churchill,* 303

5. In an action to recover for a failure to leave the surface of a tract of land in a reasonably smooth condition in accordance with a contract by which defendant was given the right to remove dirt therefrom, evidence tending to prove the cost of removing an embankment thereon and filling holes and depressions therein, and putting the surface in a smooth condition, is *held* to have been improperly excluded. *Colburn v. C., St. P., M. & O. R. Co.* 377

6. As a general rule, when public officers are required by statute to make a record of official acts, such records are admissible in evidence if relevant to the controversy. *Schlei v. Struck,* 598

7. The court having ruled that a witness might refresh his recollection by referring to a magistrate's notes of testimony in another case, he replied that he could not read. *Held,* not error to refuse to allow counsel to read such notes to him, in the absence of anything to identify them or substantiate their truthfulness. *McGibbon v. Walsh,* 670

8. If no record was kept of the action of directors of a bank in regard to releasing a mortgage, parol evidence is proper to prove the transaction. [Whether there is any presumption of the existence of any

record of executive acts done by directors, not determined.] *Goodvin v. Nichols*, 672

9. Testimony of a witness who, at the time in question, was president of the bank, that he did not think the action of the directors in a certain matter, including the release of a mortgage, appeared on the records, was sufficient *prima facie* to deny the existence of any record, where the record books were in the control of the adverse party. *Ibid.*

10. Under sec. 1492*f*, Stats. 1898, as amended by ch. 82, Laws of 1899 (providing that no person shall be competent to testify as an expert in matters pertaining to the diseases of animals unless he is registered as therein prescribed), the statement of a witness that he had been a veterinary surgeon in a certain place in the state for forty years is *held* insufficient to qualify him as a veterinary expert. *McCann v. Ullman*, 574

EXAMINATION.
Of jurors. See CRIMINAL LAW, 1-7.
Of witnesses. See TRIAL, 1, 2. WITNESSES, 2.

EXCEPTIONS. See APPEAL, 8, 15, 16. NEW TRIAL, 2.

EXECUTORS AND ADMINISTRATORS.

See CONTRACTS, 6. WILLS.

Sec. 7414, How. Ann. Stats. Mich. 1882, provides that when the sole plaintiff in a replevin action shall die during the pendency of the suit it shall be sufficient for the defendant to notify the sureties in the replevin bond to appear and prosecute the suit, and if they fail so to do then their appearance may be entered by the defendant, and thereupon the cause shall be proceeded in to judgment and execution in like manner and with like effect as though the same had been originally commenced in the name of the sureties. *Held*, that in such a case the sureties represent the estate of the deceased plaintiff, and a judgment against them is binding upon it. The owners of such judgment are entitled, therefore, to have it allowed as a claim against such estate. *Button v. Cole*, 247

EXEMPLARY DAMAGES. See BOUNDARIES, 1. LANDLORD AND TENANT, 7.

EXPERT TESTIMONY. See EVIDENCE, 2, 5, 10.

FEDERAL COURTS. See BANKRUPTCY.

FENCES. See BOUNDARIES.

FINDINGS OF FACT. See APPEAL, 6, 17, 18. DIVORCE, 2. VENDOR AND PURCHASER, 2.

FISH AND FISHING.

See ADVERSE POSSESSION, 11.

K., the owner of certain fishing tugs, etc., entered into a written contract with the commissioners of fisheries, through the superintendent thereof, to furnish said fishing outfits for the taking of fish for spawn in one of the outlying waters of the state. Subsequently said superintendent, in writing, authorized K. to permit defendant with his fishing tug to take fish for spawn on the same conditions that K.'s tugs were allowed to fish. Such permit was not delivered to the defendant, but remained in the possession of K., who instructed defendant to take white fish for spawn and de-

liver them to the superintendent. Thereafter the defendant with his tug engaged in taking fish which were turned over to the superintendent or his agent. Neither the superintendent nor his agent was ever present when such fish were taken, and on the day when the illegal fishing charged in the information was committed, both of them were absent from the place where they usually received the fish. The defendant, however, was complying in all respects with the conditions and requirements of K.'s contract with the commissioners. *Held*, that the defendant was an agent of the superintendent of fisheries, authorized in writing, within the meaning of sec. 15, ch. 311, Laws of 1899, authorizing the commissioners of fisheries, etc., to take fish at all seasons of the year from the outlying waters of the state for securing eggs for artificial propagation, etc., provided that "no such fish shall be taken except in the presence of the superintendent of fisheries or his agent authorized in writing." *State v McDonald*, 506

FLOWAGE OF LAND. See WATERS, 17, 18.

FOREIGN JUDGMENTS. See EXECUTORS.

FOREIGN LAWS. See CONTRACTS, 2-4. EXECUTORS. LANDLORD AND TENANT, 1.

FORFEITURES.

1. Under sec. 3298, Stats. 1898, a formal complaint is not necessary to give a justice of the peace jurisdiction to issue his summons in an action to collect a forfeiture, but it is sufficient if one of the officers there named, in writing, calls the attention of the justice to the fact that a person within his jurisdiction is liable to a certain penalty and directs the collection thereof by an action before such justice. *State v. Childs*, 233

2. Under sec. 3295, Stats. 1898 (providing that in actions by the state to recover forfeitures "it shall be sufficient to allege in the complaint, that the defendant is indebted to the plaintiff in the amount of the forfeiture claimed, according to the provisions of the statute which imposes it, specifying the section," etc.), a complaint alleging a liability under a section which imposes a penalty for the doing of either of two acts is sufficient, although the specific act relied on is not stated. If the defendant cannot say from the complaint alone what he is required to meet, he should request the court to require the plaintiff to elect upon which branch of the statute it will rely. *Ibid.*

FORGERY. See BILLS AND NOTES.

FRAUD. See SCHOOLS, 4.

FRAUDS, STATUTE OF. See LANDLORD AND TENANT, 1. LOGS AND LOGGING, 1. MORTGAGES. VENDOR AND PURCHASER, 1, 2.

GAMBLING CONTRACTS. See BROKERS. CONTRACTS, 3, 4. SALES, 15, 16.

GARNISHMENT.

See BANKRUPTCY, 6.

1. In consideration of the rescission of an oral contract by which parents had sold a hotel and its equipment to their son, and of the return to them of the property with the improvements made by the son, the parents agreed to pay the debts of the son incurred in the business. A creditor of the son elected to sue him, and garnished

the parents. *Held*, that thereby the unpaid purchase money in the hands of the garnishees became due to the principal defendant, and hence was subject to garnishment. *Aschermann v. Hart*, 38

2. Under secs. 3725, 3727, and 2769, Stats. 1898, a justice may require a garnishee to deliver property to him only when it is found that, at that time or some other fixed date, the defendant is or will be absolutely entitled to the property. Notes and a mortgage in the hands of an attorney for collection, upon which he has a lien for services rendered, are therefore not subject to garnishment in justice's court. *Grimsrud v. Linley*, 632

3. The defendant in an action to which a garnishee action is incident, in which issue has been joined, is a joint defendant with the garnishee in the latter action, and under circumstances coming within the last clause of sec. 2772, Stats. 1898, a judgment for costs may be rendered in favor of the two jointly. *Bank of Commerce v. Elliott*, 648

GOVERNMENT LANDS. See ADVERSE POSSESSION, 3. WATERS, 1–4, 8, 9.

GUARANTY.

Several stockholders of an embarrassed corporation, being guarantors of its indebtedness to a large amount, made an agreement among themselves by which one of them, C., in consideration of his incumbering certain of his private property as security for a portion of said debts, was to be released from liability upon another portion, including a negotiable promissory note not yet due, but the ultimate loss sustained by the failure of the company to pay its debts was to be shared equally by the guarantors. Thereafter, with the consent of the payee, C.'s name was erased from the guaranty on said note. *Held* that, even if the other guarantors did not expressly assent to such physical erasure of C.'s name, yet such assent should be implied from the other terms of their agreement, and the alteration of the note did not, therefore, release them from liability thereon. *Kane v. Herman*, 33

HIGHWAYS.

See MUNICIPAL CORPORATIONS, 15–18.

1. A town to which a specific part of a town-line highway has been apportioned to make and maintain, pursuant to sec. 1273, Stats. 1898 (providing that a "town shall have all the rights and be subject to all the liabilities in relation to the part of the highway to be made or repaired" by it as if it were wholly located therein), has exclusive jurisdiction throughout the entire width thereof for that purpose, no exception being made as to territory in the adjoining town which is common to such highway and an ancient highway which crosses it. *State v. Childs*, 233

2. There can be no highway by dedication in the absence of an intention to surrender the premises to the public for a thoroughfare. *Frye v. Highland*, 292

3. The question whether a highway at the place where an accident occurred was insufficient and unsafe for public travel is always one for the jury unless the conditions and circumstances are so clear and convincing as to leave no room for reasonable controversy. *Prahl v. Waupaca*, 299

4. In this case the question whether a turnpike eleven feet wide and eighteen inches high with abrupt banks, across which a culvert without guards had been constructed, the traveled track being one and one-half feet from its south end, was insufficient and unsafe, so as to render the town liable for injuries sustained by a traveler whose horse shied at drain pipes piled by the roadside and ran the buggy off the culvert, is *held* to have been for the jury. *Ibid.*

5. In such a case evidence of measurements, made more than a year after the accident and after material changes had been made in the turnpike, was properly rejected. *Ibid.*

6. A highway may be established by twenty years' adverse user alone. *Chippewa Falls v. Hopkins,* 611

7. A highway is not discontinued by the attempted laying out of another to take its place, where the proceedings for laying out the new highway are void and it never became a highway in fact. *Ibid.*

HUNTING AND FISHING. See ADVERSE POSSESSION, 11.

HUSBAND AND WIFE.

See DIVORCE. LIMITATION OF ACTIONS, 5.

1. An agreement between husband and wife for voluntary separation is against the legislative policy of this state and is absolutely void. *Baum v. Baum,* 47

2. An oral agreement by a husband to assign insurance policies to his wife, which has no consideration so far as the husband is concerned except a covenant on the part of the wife to separate and live apart, is without a valid consideration and will not be enforced, even though it has been partially or imperfectly executed. Sec. 2347, Stats. 1898 (permitting a husband to assign a policy of insurance to his wife), has no application to the question. *Ibid.*

3. Where the wife in such a case had no property, an action to enforce the agreement to assign the insurance policies is not an action regarding her separate estate. *Ibid.*

4. Coverture once shown is presumed to continue. *Wallace v. Pereles,* 316

5. Prior to the enactment of ch. 86, Laws of 1895, an absolute conveyance of real property from a husband directly to his wife did not carry the legal title, unless the property was purchased by the wife out of her separate estate, and the burden of proof is upon the party alleging that it was so purchased. *Ibid.*

6. All the usual incidents and marks of ownership attach to and accompany the title of a married woman to real estate, the same as if she were unmarried; and if it be a dwelling house, in which she resides, the presence of her husband does not detract from her full possession and ownership. *Cook v. Bellack,* 391

7. In an action to compel the removal of a shed, etc., from an alleged public street, it appeared that the *locus in quo* was claimed by the wife of the defendant as part of adjoining premises belonging to her, and the only act of the defendant in connection therewith was to make repairs thereon as agent for his wife. *Held,* that the complaint was properly dismissed. *Ibid.*

IMPROVEMENT of land. See ADVERSE POSSESSION, 7–12.

IMPROVEMENTS. See VENDOR AND PURCHASER, 4, 5.

INCLOSURE. See ADVERSE POSSESSION, 7, 8.

INSOLVENCY. See BANKRUPTCY. BANKS, 6–13.

INSTRUCTIONS TO JURY. See APPEAL, 7, 8, 15. NEW TRIAL, 2. TRIAL, 4, 5.

INSURANCE.

Life. See WITNESSES, 1.

1. A written application for insurance, signed by the insured, and a receipt for the first premium given at the same time by the agent of the insurer, each containing a provision that the company incurs no obligation by reason of any payment of premium unless the application is accepted and a policy granted and delivered, constitute a written contract between the parties, binding upon the applicant and those claiming under him, in the absence of fraud, and their effect cannot be varied by evidence that the agent said that the insurance would go into effect at once; nor can such oral agreement be sustained as an independent contract, in addition to that contained in the writings, there being no consideration to support it. *Mathers v. Union M. A. Asso.* 78 Wis. 588, so far as it holds to the contrary, overruled. *Chamberlain v. Prudential Ins. Co.* 4

Fire. See MONEY HAD AND RECEIVED.

2. The standard policy of fire insurance is a statutory law as well as a contract and should be treated and construed accordingly. *Temple v. Niagara F. Ins. Co.* 372

3. The standard fire insurance policy provides (sec. 1941–44, Stats. 1898) that the liability of an insurance company thereunder shall be limited to the actual cash value of the property at the time any loss or damage occurs, except when otherwise provided by statute; that such liability shall not exceed the cost of repairing or replacing the property; and that it shall be optional with the insurer to repair, rebuild, or replace the property within a reasonable time by giving notice to that effect. *Held*, that the insurer has an option to rebuild a building which has been wholly destroyed, notwithstanding the provision of sec. 1943 that the amount written in a policy upon real property which has been wholly destroyed must be taken conclusively to be the true value of the property when insured and the true amount of loss and the measure of damages when destroyed. *Ibid.*

INTENT to injure. See RAILROADS, 8.

INTEREST. See ATTORNEYS, 1.

INTERVENTION of trustee in bankruptcy. See BANKRUPTCY, 1, 2.

JOINDER.

Of causes of action. See BANKS, 7. SCHOOLS, 4.

Of parties. See BANKS, 6, 11–13. CONSPIRACY, 3, 5. EXECUTORS. GARNISHMENT, 3. MUNICIPAL CORPORATIONS, 17. SCHOOLS, 4. WILLS, 3, 8.

JUDGMENT.

Single final judgment: Disposing of all issues.

1. A judgment in favor of two defendants whose separate demurrer to the complaint had been sustained, which leaves undetermined the rights of the plaintiff as against other defendants, is error and

prejudicial to the plaintiff. Under the Code there can be but a single final judgment, except as a contrary practice is expressly authorized by sec. 2883, Stats. 1898, providing that the court may render a separate judgment *against* one or more of several defendants whenever a several judgment may be proper. *Egaard v. Dahlke,* 366

By default. See APPEARANCE. VENDOR AND PURCHASER, 4, 5.

2. A judgment by default should not be entered without proof of the service of the summons being of record. *Rockman v. Ackerman,* 639

Enforcing lien. See BANKRUPTCY, 5, 6. LIENS, 3.

Determining title to land. See MUNICIPAL CORPORATIONS, 17.

Transferring title to land. See VENDOR AND PURCHASER, 3.

For removal of purprestures. See WATERS, 16.

For costs. See ACTION, 4, 5. GARNISHMENT, 3.

Entry as directed by appellate court. See PARTNERSHIP, 5.

Docketing: Lien: Tucking.

3. Under secs. 2899, 2902, R. S. 1878, if a judgment against the mortgagor did not appear upon the judgment docket at the time a mortgage was executed and recorded, the lien of the mortgage was prior to that of such judgment, even though the latter had been filed in the office of the clerk and some entries relating to it had been made in the court records. *McKenna v. Van Blarcom,* 271

4. After the expiration of the lien of a judgment the judgment creditor cannot, by obtaining and docketing a new judgment, tack the two and thus make a continuous lien having priority over other liens existing at the time of such expiration. *Ibid.*

Conclusiveness of adjudication. See EXECUTORS. SALES, 10.

5. Every point in or assumed to be in a case, and considered and decided as a basis for the final conclusion reached, is as much *res adjudicata* as if it were the sole point in controversy and the only one upon which judgment could rest. *Trapp v. New Birdsall Co.* 543

Signature by clerk: Appeal.

6. The signature of the clerk to a judgment "by the court" is merely his certificate that it was entered by the court. An appeal therefrom is therefore not an appeal from the action of the clerk. *Egaard v. Dahlke,* 366

Limitation on collection and enforcement. See LIENS, 3. PARTNERSHIP, 4, 5.

JUDICIAL NOTICE. See MASTER AND SERVANT, 12.

JURISDICTION. See APPEAL, 1-5. APPEARANCE. BANKRUPTCY, 3, 5, 6. FORFEITURES. JUSTICES' COURTS. PROCESS. SUPREME COURT.

JURY. See CRIMINAL LAW, 1-7.

JUSTICES' COURTS.

See FORFEITURES. GARNISHMENT, 2.

1. If a justice of the peace has no jurisdiction of the subject matter to render a judgment, the circuit court obtains no jurisdiction by virtue of an appeal from such judgment. *Martin v. Eastman,* 286

2. The interposition of a counterclaim under sec. 3626, Stats. 1898, for an amount in excess of the jurisdiction of the justice, does not oust the justice of jurisdiction, but the counterclaim may properly be stricken out. *Ibid.*

3. Mistakes in a notice of appeal from a judgment rendered in justice's court do not render such notice ineffective if it contains enough to identify, with reasonable certainty, the judgment, the parties, and the court, and to show that it was made by the party appealing, personally, or by some person or persons duly authorized, in behalf of such party. *Patrick v. Baldwin,* 342

4. A notice of appeal from a judgment rendered in justice's court against a town, signed by three persons with the word "Supervisor" under the last signature, the signatures and the official designation being so located that if the plural number were used instead of the singular it would clearly indicate that all signed officially, shows with reasonable certainly that it was so signed, where there is no indication in the notice to the contrary. *Ibid.*

5. The original charter of a city (ch. 128, Laws of 1887) provided for the election of two justices of the peace, to hold office for two years, and to have the same powers, jurisdiction, etc., as justices of the peace of the several towns. By ch. 22, Laws of 1891, the charter was amended by increasing the number of justices to three, and their term from two to three years, that portion of the charter defining their jurisdiction, however, remaining unchanged. *Held,* that although the legislature is precluded by sec. 15, art. VII, Const., from conferring more than two years' terms upon justices of the peace, and has power, under sec. 2, art. VII, to create municipal courts limited in jurisdiction to the city, with terms of office in discretion, yet, it having no power, by a repeal of the only provision for the election of justices of the peace, to deprive the inhabitants of the city of the right to elect such justices, there is no presumption that the amendment of 1891 was an attempt to create municipal courts; and persons elected, qualified, and acting as justices of the peace under the amended charter are, *de facto* at least, such justices, with jurisdiction accordingly. *Trogman v. Grover,* 393

LACHES. See CORPORATIONS, 13. EQUITY, 4.

LAKES. See WATERS, 1-16.

LAND CONTRACT. See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Privilege of renewal: Notice: Waiver.

1. A lease for a certain term, "with the privilege of four years more . . . by giving ninety days' notice" before the expiration of the original term, is an unconditional lease for the first period and a conditional lease for the four years thereafter, and if the notice is given the lessee holds for the additional term under the original lease and not under the notice. The notice is therefore not within the statute of frauds of Illinois (sec. 2, ch. 59, Starr & C. Ann. Stats. Ill. 1896), and may be given by an agent having no written authority. *Sheppard v. Rosenkrans,* 58

2. In such a case acceptance of a notice not seasonably given, and action thereon without objection, constitute a waiver of the condition as to the time of giving the notice. *Ibid.*

Writ of restitution: Wrongful removal of goods: Constables: Damages.

3. Where a writ of restitution, valid on its face, is delivered to a constable, it becomes his duty to execute it without inquiry as to whether it will result in inconvenience or loss to the parties, and if he executes it without knowledge of its invalidity it affords him complete protection. *Gaertner v. Bues,* 171

4. In the execution of a writ of restitution an officer is bound to use ordinary care and not do unnecessary injury to the property of the evicted tenant, and if he fails in that respect, both he and his principal are liable therefor. *Ibid.*

5. If the evicted tenant fails to take the goods as they are removed, the officer may put them in a storage warehouse, and, if he exercises reasonable care in the selection of the warehouse and in the removal of the goods thereto, his full duty has been performed. *Ibid.*

6. After removal of the goods to the warehouse in such a case a delivery to the evicted tenant of the warehouse receipt therefor is equivalent to a delivery of the goods to him, and his acceptance thereof restores him to full dominion over them, so that any loss or depreciation in value occurring thereafter cannot be recovered as an element of damages in an action against the landlord for the wrongful removal. *Ibid.*

7. Punitory damages for the wanton and malicious acts of the officer who executed an invalid writ of restitution, whereby injury was caused to the evicted tenant or his goods, are not recoverable against the landlord unless he is shown to have authorized or ratified such acts. *Ibid.*

LEGISLATIVE JOURNALS. See STATUTES, 1.

LICENSE. See ADVERSE POSSESSION, 1, 2.

LIENS.

Of mechanics, etc., for labor and materials.

1. A subcontractors' notice of a claim for a lien, which complies with all the requirements of sec. 3315, Stats. 1898, is not rendered insufficient by a superfluous statement therein that the owner of the property expressly agreed to become personally responsible to the subcontractors for their work. *Wambold v. Gehring,* 123

On logs and lumber.

2. A cause of action to recover for work done by plaintiffs under a contract with defendants for the sawing of logs, and to enforce a lien therefor upon lumber so sawed and still in the ownership of the defendants, is a cause of action upon contract, and, under sec. 2647, Stats. 1898, may be joined with a cause of action to recover for a breach of a provision in the same contract by which defendants agreed to furnish a certain quantity of logs to be sawed. Remarks in *Collins v. Cowan,* 52 Wis. 634, and *Shafer v. Hogue,* 70 Wis. 392, as to the nature of lien actions, limited, and the cases distinguished. *Reindl v. Heath,* 570

3. Judgment in plaintiffs' favor in such a case should provide for a recovery of the entire amount of the liability, and direct enforcement of the lien for such portion only as was properly lienable. *Ibid.*

Of garnishment. See BANKRUPTCY, 5, 6.

Of attorneys. See GARNISHMENT, 2.

Of docketed judgment. See JUDGMENT, 3, 4.

LIFE INSURANCE. See INSURANCE, 1.

LIMITATION OF ACTIONS.

See ACTION, 2, 3. BANKS, 9, 10. MUNICIPAL CORPORATIONS, 19, 20.

1. The provision of sec. 4222, Stats. 1898, that no action to recover for an injury to the person shall be maintained unless within one year after the accident notice in writing shall be served on the person or corporation sought to be charged with liability, stating the time and place of the injury, etc., is a statute of limitation and does not prescribe a condition precedent to the right to sue. *Malloy v. C. & N. W. R. Co.* 29

2. Looking to the legislative purpose, and in order to avoid absurd consequences, the words "shall be served," in said sec. 4222, Stats. 1898, are construed to mean "shall have been served," and the requirement that notice be served within one year is *held* inapplicable where the action is commenced within that time. *Ibid.*

3. Although the complaint in an action for personal injuries alleged the giving of the notice required by sec. 4222, Stats. 1898, a general denial did not put the defendant in a position to rely upon the limitation as a bar to the action, plaintiff's cause of action being complete without such allegation. *Ibid.*

4. In order to avail himself of the defense of the statute of limitations a party must, in his pleading, either refer to the statute or set out the facts showing that the limitation has run. *Ibid.*

5. Defendant was a married woman living upon a farm of her own, operated for her by her husband, who supported the family. Prior to 1888 she purchased goods of plaintiff upon open account, which was never settled. In 1894 the husband purchased seed of plaintiff which he paid for in a few days, the seed, however, being charged to defendant and the amount paid credited upon the account as cash. During the interval the husband had purchased barbed wire, giving therefor his notes, which were afterwards paid. Both the wire and the seed were used upon the farm. *Held*, that each of the later purchases was an independent transaction which could not be tacked to the old account so as to avoid the bar of the statute of limitations. *Moore v. Blackman,* 528

6. A finding that on a certain date more than six years after the last item in an open account the creditor delivered to the debtor a copy of the account, and she agreed to pay it, and did not object to any item thereof, does not show that the case was taken out of the operation of the statute of limitations, under the provision of sec. 4243, S. & B. Ann. Stats., that no acknowledgment or promise shall be sufficient for that purpose unless in writing, signed by the debtor. *Ibid.*

LIQUIDATED DAMAGES. See MUNICIPAL CORPORATIONS, 14.

LOCAL LAWS. See CONSTITUTIONAL LAW, 1–4.

LOCAL SELF-GOVERNMENT. See MUNICIPAL CORPORATIONS, 1–6.

LOGS AND LOGGING.

Liens. See LIENS, 2, 3.

Sales of standing timber: Reservation of title: Estoppel.

1. A contract for the sale of standing timber, providing that until all payments are made "the title, ownership, possession, and right of possession of said timber, or the lumber manufactured therefrom, wherever the same may be, shall be and remain" in the vendor, is a contract for the sale of an interest in land, and is not affected by sec. 2317, Stats. 1898, requiring the filing of conditional sales of personal property in order to make them valid as against third persons. *Mississippi R. L. Co. v. Miller,* 77
2. Such a conditional sale is valid and title remains in the vendor not only as against the vendee but also as against a *bona fide* purchaser from the vendee who has paid for the property without notice of the vendor's claim; but the vendor may, by his acts, be estopped from asserting his title as against such a purchaser. *Ibid.*
3. The vendor under such a contract knew that the vendee was engaged in manufacturing and selling lumber, and that the timber conveyed was to be manufactured and sold, but gave immediate possession to the vendee and allowed that possession to be accompanied with all the *indicia* of title and apparent right to sell. He also made extensions of time for the payment of part of the purchase price, at one of which times he had express notice that the vendee was actively engaged in selling lumber. *Held,* that the vendor was estopped from asserting his right as against a person who had purchased from the vendee in the ordinary course of business, without notice of the vendor's claim, and had paid the full purchase price before receiving any notice thereof. *Ibid.*
4. The vendor of standing timber under a contract reserving title in himself until payment of the purchase price, who contemplated at the time of the sale that his vendees were to manufacture the logs and sell the lumber therefrom, and who so dealt and acted concerning such lumber as to lead an ordinarily prudent man to believe that his vendees were the owners thereof or that they had authority to sell the same and give title thereto, is estopped to assert his reserved title as against purchasers from said vendees who bought and fully paid for the lumber without knowledge of his title or of any facts to put them upon inquiry in reference thereto. *Stubbings v. Curtis,* 307
5. The original contract of sale in such case, being a contract for the sale of real estate, was not entitled to be filed in the city clerk's office, and evidence that it was so filed was inadmissible in an action against purchasers from the original vendees who are not shown to have had actual knowledge of that fact. *Ibid.*

Dams to facilitate logging. See WATERS, 17.

MARRIED WOMEN. See HUSBAND AND WIFE. LIMITATION OF ACTIONS, 5.

MASTER AND SERVANT.

Contract of employment: Entire contract: Partial performance.

1. The rule that where an employee under an entire contract wrongfully terminates it he cannot recover thereon, or at all, for services rendered up to the time of such termination, does not apply to a

case where such a contract has been terminated by the employer for cause. *Hildebrand v. American Fine Art Co.* 171

2. The rule generally in this country is that, where a servant is prevented from performing his contract, either from sickness or death or by reason of being discharged from the master's service, whether rightfully or wrongfully, he is entitled to recover for the services actually rendered, subject to the right of a recoupment in case of a rightful discharge, as hereafter stated. *Ibid.*

3. In an action against an employer, by an employee who has been discharged for cause, to recover for services rendered, the employer may recoup such damage as he is legally entitled to by reason of the facts which rendered such discharge justifiable. *Ibid.*

4. Though the general rule is that where a contract is entire the consideration moving from each party to the other is entire and the rights of the parties reciprocal, full performance by one being requisite to his claiming any benefit under the contract from the other, it admits of exceptions, and one of them is that it does not apply to a party failing to complete his contract when prevented from so doing by the other party, regardless of the reason for such prevention. *Ibid.*

5. The circumstance of terminating an entire contract for labor bears on the right of one seeking compensation for part performance thereof, as follows:

(a) If one party withdraws by consent of the other after part performance of such a contract, he can recover thereon at the contract rate for what he has done.

(b) If a party to such a contract be wrongfully prevented by the other from rendering full performance, he can recover upon the contract for the services rendered prior to such prevention, and his damages for not being allowed to complete the contract, not exceeding the full amount he could have earned by such performance, such amount, *prima facie*, being full wages for the balance of the contract period, which may be reduced by proof that wages were or might reasonably have been earned during such time.

(c) If, after part performance of such a contract by one party, he is rightfully prevented by the other from further performance, he can recover on the contract for services rendered up to the time of such prevention, subject, however, to such damages as the other party may recoup in the action for the former's misconduct. *Ibid.*

6. In an action to recover for part performance of a contract, of the party who has rightfully terminated the same, *prima facie* the amount recoverable is the contract rate for services rendered up to the time of the discharge; and that will prevail in the absence of a claim for damages properly pleaded as a counterclaim and established on the trial. *Ibid.*

7. A person circumstanced as last above indicated must sue upon the contract or for damages, not upon a *quantum meruit*, though his recovery must be upon that basis, it being presumed that he earned and is entitled to the contract rate for the time his services continued, till the contrary is shown by evidence to sustain a properly pleaded counterclaim. *Ibid.*

Injuries to servants: Negligence.

8. In an action against his employer to recover for injuries caused by plaintiff's hand coming in contact with a "slat saw," it is *held* im-

possible, in the light of undisputed physical facts, that the injury could have been caused, as found in the special verdict, by the portion of the saws above the feed table. *Beyersdorf v. Cream City S. & D. Co.* 456

9. The finding as to the particular peril from which the injury resulted being thus conclusively wrong, other findings of the special verdict as to defendant's negligence proximately causing the injury, plaintiff's knowledge of perils, instruction as to same, and exercise of care to avoid them, are vitiated, because they refer to the particular peril mentioned: and the whole verdict is rendered inconclusive and insufficient to support any judgment. *Ibid.*

10. Where in such a case there is a reasonably possible theory of the injury consistent with the employer's due care in the equipment and operation of the machine, the mere happening of the accident does not suffice to establish his negligence and liability. *Ibid.*

11. In an action to recover for the death of an engineer who was killed by the explosion of a boiler of which he had charge in defendants' mill, it appeared, among other things, that three days before the explosion the deceased discovered a small leak in a horizontal seam in the boiler; that he reported it to defendants, who thereupon employed a skilled boiler repairer to do whatever was necessary; that such repairer made a careful visual examination and a hammer test without discovering any signs of weakness, and then calked the seam and stopped the leak: that he also asked the deceased whether he should make a pressure test, but was told not to do so; and that the explosion occurred the following day when steam was generated in the boiler and had reached a pressure of between ninety and a hundred pounds. Plaintiff's evidence also showed that it was not customary for repairers to take other precautions than those taken, and no negligence prior to the discovery of the leak was claimed. Inspection of the boiler after the explosion showed that there was an old crack in the underlying lap of steel, extending several feet horizontally between the rows of rivets, which, however, did not extend through the whole thickness, and could not have been discovered either by external or internal inspection or by sound. *Held*, that the defendants were not liable. *Kramer v. Willy,* 602

12. At least as much knowledge of the necessity of a pressure test in a boiler in which a leak has been stopped by calking is to be imputed to a trained engineer as can be assumed by a court by virtue of its imputed acquaintance with merely the common knowledge on that subject. *Ibid.*

MAXIMS.
De minimis non curat lex. 662.
Judicia sunt tanquam juris dicta et pro veritate accipiuntur, 554.
Justitia nemini neganda est, 594.
Res judicata pro veritate accipitur, 555.

MEASURE OF DAMAGES. See DAMAGES.

MECHANICS' LIENS. See LIENS, 1.

MILLS AND MILL DAMS. See ARBITRATION, 2, 3. WATERS, 17-19.

MISTAKE. See ARBITRATION, 1, 2.

MONEY HAD AND RECEIVED.

See MUNICIPAL CORPORATIONS, 11-13.

A complaint alleging that the loss by fire on defendant's stock, including plaintiff's victoria which was in defendant's possession for repairs, had been adjusted by the insurer and paid to the defendant, and that the latter had refused to pay over the share to which plaintiff was entitled, stated a cause of action for money had and received; and when plaintiff's evidence showed that no claim for the value of the victoria was made to or adjusted by the insurer, a nonsuit should have been granted. *Johnston v. Charles Abresch Co.* 182

MORTGAGES.

See ATTORNEYS, 2. EQUITY, 2. JUDGMENT, 3, 4.

The lien of a mortgage upon land may be effectually released without writing and without actually delivering up the instrument, if the oral release is so acted upon and carried into execution as to arouse equities demanding protection on the principle of estoppel. *Goodvin v. Nichols,* 672

MUNICIPAL CORPORATIONS.

Officers: How elected or appointed: Terms: Local self-government: Police officers.

1. Ch. 247, Laws of 1897, which attempted to extend the term of office of the chief of police in the defendant city, among other such corporations, beyond the term for which he was specifically elected, if valid, entitled him to hold such place and receive the emoluments thereof till succeeded by a person appointed to his place under such act. *O'Connor v. Fond du Lac,* 253

2. Sec. 9, art. XIII, of the constitution, prohibits the legislature from interfering in any way with the question of what person shall hold any office in any city in this state of a character known at the time of the adoption of the constitution, whether then known by the same name as subsequently or not, and limits all power in that regard to the electors of the particular locality interested, to be exercised directly or by some municipal agency selected directly or indirectly by them. *Ibid.*

3. City governments, at the time of the adoption of the constitution, commonly included a police department, and all offices pertaining thereto, whether now known by the names they bore prior to such adoption or not, must be considered as in the class which the constitution expressly declares must be filled by election by the electors of the particular localities interested, or by appointment by such authority of such localities as the legislature shall designate. *Ibid.*

4. The idea expressed in the constitution is not that all officers of towns, cities, and villages whose election is not provided for in the constitution may be elected or appointed in such manner as the legislature may deem best, but that all officers corresponding to town, city, and village officers as regards official duty, that were known at the time of the adoption of the constitution, shall be elected or appointed by some authority of the particular locality interested, designated by the legislature. *Ibid.*

5. An act of the legislature appointing members of a police force in a city is an unconstitutional interference with local affairs. *Ibid.*

6. An act of the legislature, so far as it expressly, or by its effect, extends the term of office of a member of the police force of a city beyond that for which he was specifically elected or appointed by legitimate municipal authority, so as to keep such officer in place for any period of time regardless of such authority, is unconstitutional and void. *Ibid.*

Same: Who are "officers"? Salaries: Change during term.

7. Firemen being expressly included by the city charter of Superior (Laws of 1891, ch. 124, secs. 11, 21) among the appointive "officers" of the city, their salaries are governed by the provisions of sec. 15 of the charter, to the effect that every officer of the city, with certain exceptions, shall be paid an annual salary; that the common council in the month of March shall fix the salary of every such officer who may be elected or appointed during the ensuing year; and that the salary of an officer so fixed shall not be increased or diminished during his term of office. *Nelson v. Superior,* 618

8. The salary of a public officer is not a matter that can be fixed by contract, either before or after the term commences, but is an incident of the office, and the incumbent thereof has the same title to the salary that he has to the office. *Ibid.*

9. Where the law prohibits a municipality from changing the compensation of an officer during his term of office, he will not be estopped, by signing an agreement to accept a less amount in consideration of being retained in office, and by accepting the amount so stipulated for his services, from recovering the balance of his legal salary. *Ibid.*

10. To warrant this court in reversing a judgment which denies the right of an officer to recover as salary any sum in addition to what he had received and accepted, it must appear from the record what salary he was legally entitled to. And where the law required that his salary be fixed by the common council at a certain time, a showing that it was fixed by the council at another time is insufficient, such action of the council being illegal. *Ibid.*

Justices of the peace: Election: Term. See JUSTICES' COURTS, 5.

Liability for money borrowed: Ultra vires: Pleading.

11. Where the officers of a town, assuming to act in its behalf and having the appearance of authority, borrowed money, representing that it was to be used for lawful town purposes, and it was so used, and the lender acted in good faith, the law implies a promise to return the money, upon which an action for money had and received will lie. *Thomson v. Elton,* 589

12. The doctrine of *ultra vires* cannot be invoked by a municipal corporation, in the absence of some prohibitory law, to protect itself from liability to refund money which it has received and of which it has had the legitimate benefit, where the individual dealing with the corporation has parted with his money believing that the corporation had a lawful right to acquire it. *Ibid.*

13. A general allegation that the money received by the municipality was used for lawful municipal purposes, so that it had the full benefit thereof, is sufficient upon demurrer. At most such a complaint would be open to a motion to make more definite and certain. *Ibid.*

Liability for support of paupers. See PAUPERS.

Public improvements: Contracts: Failure to perform: Damages.

14. A contract with a city to construct certain improvements for specified amounts provided that payments should be made on estimates as the work progressed; that the work should be completed at specified dates; that liquidated damages at a fixed sum per day should be paid in case of noncompletion at such times; and that in case the work was not prosecuted with diligence the city might complete the same or relet it and charge the cost to the contractors. The contractors, after prosecuting the work for a time, abandoned it, certain sums being still owing them for work actually done. The city thereupon completed the work, necessarily expending certain sums in excess of the contract price, the aggregate of which was greater than the amount due the contractors. *Held*, that such sums, as well as the liquidated damages for noncompletion of the work, were proper offsets against the claim of the contractors. *Nichols v. Superior*, 643

Streets: Width: Estoppel: Title: Structures not in aid of travel.

15. The fact that a city had caused a survey of a street to be made which fixed its width at sixty feet, and had constructed a sidewalk on the line thus established, would not estop it (as against an abutting owner who had done nothing in the way of expenditure of money or erection of buildings in reliance upon the city's action) from claiming, many years after, an additional twelve feet as part of the street. *Davis v. Appleton*, 580

16. A city has no right to erect on a street a water tank or other permanent structure which does not aid public travel and injuriously affects the beneficial enjoyment of his premises by an abutting owner, or his means of ingress and egress. *Ibid.*

17. In an action between a lotowner and a city involving the title to a strip of land claimed by the city as part of the street, the lotowner was found to have no title to the strip, but the evidence showed that it might be a serious question whether her grantor was not the owner thereof. *Held*, that a judgment adjudging the strip to be a part of the street and that the lotowner remove her buildings therefrom would not be justified. *Ibid.*

Same: Removal of obstruction: Direction by council to bring suit.

18. Plaintiff city attempted to lay out an extension of G. street to take the place of an existing highway, but admittedly failed by reason of defects in the proceedings. After said extension had been used for about two years the owner of the land closed it up, and also closed up the old highway, which, however, had never been entirely abandoned by the traveling public. Subsequently the common council directed the city attorney to commence proceedings against said land owner "for the removal of an obstruction placed by him across the extension of G. street." *Held*, a sufficient direction for the commencement of proceedings for the removal of the obstruction from the highway as it existed before the attempted change, although such highway had never been named and its designation as an extension of G. street was not entirely accurate. *Chippewa Falls v. Hopkins*, 611

Claims: Modification of remedy. See CONSTITUTIONAL LAW, 7.

Same: Actions: Conditions precedent: Restraining erections.

19. The provision of the charter of Appleton (sec. 24, subch. V, ch. 441, Laws of 1885) that except in case of a city order "no action shall be maintained . . . against the city upon any claims or demands of any kind whatsoever, whether arising from contract or otherwise, until" such claim shall have been presented to the common council, is not a condition precedent to the right of action, but is in the nature of a statute of limitation. It is not necessary, therefore, for the plaintiff to allege compliance with the provision, but the answer must set up the failure to comply or the defense will be waived. *Davis v. Appleton,* 580

20. Such a charter provision is inapplicable to an action for equitable relief only, such as an action to restrain the city from erecting a water tank on land claimed by the plaintiff. *Ibid.*

MUNICIPAL COURTS. See JUSTICES' COURTS, 5.

MUTUALITY. See CONTRACTS, 6, 9.

NEGLIGENCE.

Causing death: Damages: Parent and child.

1. In an action under secs. 4255, 4256, Stats. 1898, for the negligent killing of a boy, allegations that he was not married, that he was seventeen years of age at the time of his death, and was an intelligent, healthy young man, capable of doing business and earning considerable sums of money, and that he left a father surviving, are *held* sufficient to warrant the recovery of the ordinary value of the services of an ordinary boy of the age of deceased for the balance of his minority, but not of any special damages by reason of the peculiar ability of the deceased to earn money, or for loss based on reasonable anticipation of receiving pecuniary benefits from a continuation of the life of the deceased subsequent to his minority. *Luessen v. Oshkosh E. L. & P. Co.* 94

2. As between a parent and a wrongdoer who has negligently caused the death of his minor son, the parent is entitled to damages for loss of services, notwithstanding a probability that, had the son lived, the father might have allowed him to spend his time in idleness, or might have given him his time. *Ibid.*

Injuries from defective highways. See HIGHWAYS, 3–5.

Injuries to servants. See MASTER AND SERVANT, 8–12.

Injuries to persons crossing tracks. See RAILROADS.

Notice of claim. See ACTION, 2.

Limitations. See LIMITATION OF ACTIONS, 1–3.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NEW TRIAL.

See APPEAL, 4, 11, 12, 19, 20. CRIMINAL LAW, 2, 10. VENDOR AND PURCHASER, 4.

1. Where the record recites that a verdict was rendered, and that "thereupon the defendant moved for a new trial," it will be presumed on appeal, in the absence of a showing to the contrary, that the motion was made at the same term at which the action was tried. *Johnston v. Charles Abresch Co.* 182

2. If a trial judge has committed error in instructing the jury, he may grant a motion for a new trial on that ground even though no exception was taken to any portion of the charge. *McCann v. Ullman*, 574

NOTICE.
Of injury on highway. See ACTION, 1.
Of damage to property. See ACTION, 2.
Of claim against city. See ACTION, 3.
Of adverse occupancy. See ADVERSE POSSESSION, 2, 11, 12.
Of contract. See CORPORATIONS, 7.
Of appeal. See JUSTICES' COURTS, 3, 4.
Of extension of lease. See LANDLORD AND TENANT, 1, 2.
Of claim for lien. See LIENS, 1.
Of injury. See LIMITATION OF ACTIONS, 1–3.
Of claim to lumber. See LOGS AND LOGGING, 2–5.
Of want of authority. See PARTNERSHIP, 2.
Of defects, to vendor. See SALES, 9–11.

NUISANCES. See WATERS, 15, 18.

OFFICERS.
Who are "officers"? See MUNICIPAL CORPORATIONS, 7.
How chosen: Local self-government. See MUNICIPAL CORPORATIONS, 1–6.
Eligibility: School district clerk. See SCHOOLS, 2.
De facto officers. See JUSTICES' COURTS, 5.
Term of office: Vacancy: Resignation. See SCHOOLS, 1.
Salaries: Uniformity in county government. See CONSTITUTIONAL LAW, 4.
Salaries: Change during term. See MUNICIPAL CORPORATIONS, 7–10.
Powers. See MUNICIPAL CORPORATIONS, 11.
Officers of corporations. See BANKS, 7, 9, 11. CORPORATIONS, 5–14.

OPINION EVIDENCE. See EVIDENCE, 2, 5, 10.

ORDERS, appealable and reviewable on appeal. See APPEAL, 1–4, 11, 12.

PARENT AND CHILD. See NEGLIGENCE.

PARTIES. See BANKRUPTCY, 1, 2. BANKS, 6, 11–13. CONSPIRACY, 3, 5. EXECUTORS. GARNISHMENT, 3. MUNICIPAL CORPORATIONS, 17. SCHOOLS, 4. WILLS, 2–4, 8.

PARTNERSHIP.

Settlement of firm debt by one partner: Attorneys at law.

1. In an action by one member of a firm of attorneys against a railway company to recover for services rendered by the firm, the other partner being made a defendant because he refused to join as plaintiff and claimed that he had settled for such services in an agreement for his future employment by the company upon a monthly salary, the evidence is *held* insufficient to warrant the trial court in setting aside findings of the referee that the defendant partner fraudulently concealed from the plaintiff the fact that he had released the company from liability for said services; that the general counsel of the railway company aided and abetted him in such concealment; and that the value of said services was $25 per day. *Remington v. Eastern R. Co.* 154

2. Settlement by one partner will not conclude the firm, if obviously unreasonable, or if the consideration, other than money, moves primarily to the personal benefit of the settling partner. In such

cases the opposite party is so chargeable with notice of want of authority that he is held to act subject to the actual consent or approval of the absent partner. *Ibid.*

3. It is unreasonable for one member of a firm of attorneys, without the consent of his copartner, to release a claim of the firm for $2,200. for an indefinite, momentarily terminable agreement to pay the settling partner a salary of $200 per month for future services — a sum not shown to be substantially in excess of the probable reasonable value of such services — especially where the partner so employed might terminate the partnership at will. *Ibid.*

4. Where one partner settles a firm debt without authority and under such circumstances as not to conclude the other partner, the latter, in an action against his copartner and the debtor, should have judgment for the entire amount of the debtor's liability, limited as to collection and enforcement, however, to such sum as he is entitled to receive, as between himself and his copartner, from the assets of the partnership, inclusive of such judgment. *Ibid.*

5. Where the entry of such a judgment has been directed by the supreme court on appeal, it is the duty of the trial court to enter judgment at once for the full amount of the debtor's liability. Execution of that judgment, however, is entirely within the control of the trial court, and any steps by way of accounting, which may be necessary to render its enforcement and execution equitable, are within its inherent power, and no specific directions to that end are necessary in the mandate. *Ibid.*

Pleading: Promise of one partner to pay firm debts.

6. A complaint alleging that defendant and another were partners in carrying on a hotel; that plaintiff sold said partners milk, for which a balance is still due; and that thereafter defendant purchased the interest of his partner and as part of the consideration agreed to pay the debts of the firm, states a cause of action for the enforcement of defendant's promise to pay the firm debts and not a cause of action to enforce a partnership obligation. *McGibbon v. Walsh,* 670

PAUPERS.

1. While receiving aid from a county, acting under the county system for the relief of the poor, out of the "soldiers' relief fund" provided for by secs. 1529*a*–1529*i*, Stats. 1898, the recipient is precluded from gaining a settlement in the county by subd. 4, sec. 1500, providing that "no residence of a person in any town while supported therein as a pauper shall operate to give such person a settlement in such town." *Juneau Co. v. Wood Co.* 330

2. There is no legal obligation resting on a municipal corporation to maintain or relieve poor persons in the absence of a statute creating one, and the court has no power, upon the ground of moral obligations or the equities of any given case, to hold such a corporation liable to a private person who may have relieved or supported a poor person. *Patrick v. Baldwin,* 342

3. Where the law imposes on a municipality the duty of maintaining poor persons, and designates officers thereof to act in its behalf in the performance of such duty, their mere neglect will not operate as an implied request to a private party to supply a needy person's wants, upon which such party can act and hold the municipality liable as upon an implied contract. *Ibid.*

4. The statute requiring each town in this state to support poor persons in certain cases, and the supervisors thereof to see that such support is furnished, does not permit a private party to aid or relieve such a person at the expense of the town without a contract to that effect, made between him and such supervisors or a majority thereof. *Ibid.*

5. Ch. 216, Laws of 1895 ("an act to simplify the method of giving aid to paupers and the method of collecting the same in certain cases"), did not relieve the municipality in which a pauper had a legal settlement from ultimate liability for aid given him by another municipality in any case where the former would have been ultimately liable under the previously existing statute, but merely changed in certain cases the remedy of a municipality furnishing aid, so that in all cases it might obtain reimbursement from the county in which it was located, and such county might in turn obtain reimbursement from the municipality in which the pauper had his settlement, if any. *Portage Co. v. Neshkoro,* 520

PLEADING. See ACTION, 1–3. APPEAL, 14. BANKRUPTCY, 3–5. BANKS, 7–9, 11. CORPORATIONS, 13. ESTOPPEL. FORFEITURES, 2. LIMITATION OF ACTIONS, 3, 4. MUNICIPAL CORPORATIONS, 13. NEGLIGENCE, 1. PARTNERSHIP, 6. SCHOOLS, 4.

POLICE OFFICERS. See MUNICIPAL CORPORATIONS, 1–6.

POOR LAWS. See PAUPERS.

POSSESSION of land. See ADVERSE POSSESSION.

PRACTICE. See ACTION, 4, 5. APPEAL. APPEARANCE. BANKRUPTCY. CERTIORARI. CRIMINAL LAW. EVIDENCE. FORFEITURES, 2. GARNISHMENT, 3. JUDGMENT. JUSTICES' COURTS, 1–4. LIENS, 3. NEW TRIAL. PARTNERSHIP, 5. PROCESS. TRIAL. VENDOR AND PURCHASER, 4. WITNESSES.

PRESCRIPTION. See ADVERSE POSSESSION. HIGHWAYS, 6. WATERS, 18.

PRESUMPTIONS. See ADVERSE POSSESSION, 6. APPEAL, 6. BANKS, 4. EVIDENCE, 8. HUSBAND AND WIFE, 4, 5. JUSTICES' COURTS, 5. MASTER AND SERVANT, 7, 10. NEW TRIAL, 1. SALES, 15, 16. STATUTES, 1, 5.

PRINCIPAL AND AGENT. See BROKERS. CORPORATIONS, 6, 7, 15–17. LANDLORD AND TENANT, 1. SALES, 11. VENDOR AND PURCHASER, 1, 2.

PRINCIPAL AND SURETY. See EXECUTORS.

PROCESS.

See JUDGMENT, 2. LANDLORD AND TENANT, 3, 4, 7.

1. Where service of summons was attempted to be made by publication, the fact that the order for publication was not made until twenty-five days after the making of the affidavit therefor shows that the court was without jurisdiction. *Rockman v. Ackerman,* 639

2. In order that the court may acquire jurisdiction by the service of summons by publication under secs. 2639, 2640, Stats. 1898, copies of the summons and complaint must be mailed to the defendants *in pursuance of the order of the court,* and a mailing before the order was made is insufficient. *Ibid.*

PROMISSORY NOTES. See BILLS AND NOTES.

PROXIMATE CAUSE. See RAILROADS, 7.
PUBLICATION. See PROCESS. STATUTES, 2.
PUBLIC IMPROVEMENTS. See MUNICIPAL CORPORATIONS, 14.

PUBLIC LANDS.

See ADVERSE POSSESSION, 3. WATERS, 1-4, 8, 9.

1. The meander line of a lake as shown on the government survey is not a "boundary line;" nor is a meander post at the intersection of the meander line and section line a "corner;" nor is the distance between the meander post and the nearest corner the "length of a boundary line," within the meaning of the provisions of sec. 2396, R. S. of U. S., that "all corners marked in the survey . . . shall be established as the proper corners," which they are intended to designate, and that "the boundary lines actually run and marked . . . shall be established as the boundary lines . . . and the length of such lines, as returned, shall be held and considered as the true length thereof." *Underwood v. Smith*, 334
2. Where a fractional quarter quarter section is represented on the government survey as extending to a meandered lake, the lake itself and not the meander line is the boundary if the lake is within that subdivision; otherwise the boundary is the next line which divides quarter quarter sections. *Ibid.*
3. Under the provision of sec. 2396, R. S. of U. S., that "boundary lines which have not been actually run and marked shall be ascertained by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west, as the case may be, to the watercourse . . . or other external boundary of such fractional township," — "due east and west" means a mean course between the north and south boundaries of the section, where such boundaries are ascertained and fixed. *Ibid.*

PUBLIC POLICY. See CONTRACTS, 4. HUSBAND AND WIFE, 1.
PUBLIC SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS.
PUNITORY DAMAGES. See BOUNDARIES, 1. LANDLORD AND TENANT, 7.
PURPRESTURES. See WATERS, 12-16.
QUANTUM MERUIT. See MASTER AND SERVANT, 7.

RAILROADS.

Right to acquire fee in land. See WATERS, 14.
Injuries to travelers on highways: Contributory negligence.

1. The known presence of a railway track is itself notice of the momentary peril of a passing train at all times, and the duty to look and listen is not relaxed by any opportunity for theorizing or difference of opinion as to whether a train is or is not likely to pass. A remark to the contrary in *Ward v. C., St. P., M. & O. R. Co.* 85 Wis. 601, overruled. *Guhl v. Whitcomb*, 69
2. "Diversion of attention" will not justify a failure to look and listen at a highway crossing, except in cases where the attention is so

irresistibly forced to something else as to deprive the traveler of the opportunity to perform that duty. The duty to look and listen is absolute *where the opportunity exists.* *Ibid.*

3. Plaintiff, a girl nineteen years old, riding northward on a bicycle on a highway which crossed a railway track at an angle of only sixteen degrees, dismounted at a point 105 feet from the crossing and about on a line with the right-of-way fence, looked to the south, in which direction her view was unobstructed for at least 800 feet, and then proceeded slowly on foot, without again looking south, until she reached the crossing, where she was struck by a train from that direction. While approaching the track she had noticed a train about 2,000 feet to the northward, which she thought was approaching slowly, but her view of that train was again obstructed until she was within a few feet of the crossing. She could not see the sidetrack upon which such train was in fact standing, and did not know of its existence, although she lived a short distance away. *Held*, that she was negligent in omitting to look for a train from the south. *Ibid.*

4. If a person approaches a railway track to cross or enter upon it, ordinary care, as a matter of law, requires him, before doing so, to look and listen for a coming train, and, if there is one in plain sight or hearing, so circumstanced as to suggest reasonable probability of danger for such person to proceed, to discover such situation and not to go upon the track till the danger is past. *Brown v. C. & N. W. R. Co.* 384

5. The rule above stated is absolute, so that a person about to enter upon a railway track is chargeable with knowledge of such dangers as he may reasonably discover by the use of his sense of sight and that of hearing. Neither violation of statutory regulations on the part of the railway company as regards the speed of its trains or signaling the approach thereof, nor any other negligent act on its part, nor mere diversion of attention on the part of the injured person, will excuse him from the performance of his duty to care for his own safety. *Ibid.*

6. Failure on the part of a railway company to comply with statutory regulations as to the speed of its trains in running through a village, or failure to signal the approach thereof to a street or highway crossing, as the law requires, is negligence *per se*, but not necessarily actionable negligence at the suit of one injured by such a train. *Ibid.*

7. In the circumstances last above stated, the mere unlawful act does not constitute actionable negligence unless the injury be proximately caused thereby, without want of ordinary care on the part of the injured person, contributing thereto. *Ibid.*

8. The mere intentional running of a railway train contrary to police regulations, designed to promote the safety of persons in crossing the track, does not constitute actual or constructive intent to inflict an injury upon such a person, so that if he is injured thereby he may recover compensation therefor regardless of his own contributory negligence. *Ibid.*

Killing of animals: Notice. See ACTION, 2.

Destruction of property by fire: Notice. See ACTION, 2.

RATIFICATION. See CONTRACTS, 7. LANDLORD AND TENANT, 7.

REAL-ESTATE AGENTS. See VENDOR AND PURCHASER, 1, 2.

REAL PROPERTY. See ADVERSE POSSESSION. ARBITRATION, 2, 3. BOUNDARIES. DEEDS. EQUITY. HIGHWAYS, 2, 6, 7. HUSBAND AND WIFE, 5-7. INSURANCE, 3. JUDGMENT, 3, 4. LANDLORD AND TENANT. LIENS, 1. LOGS AND LOGGING. MORTGAGES. MUNICIPAL CORPORATIONS, 15-18. PUBLIC LANDS. SCHOOLS, 4. VENDOR AND PURCHASER. WATERS.

RECORD on appeal. See APPEAL, 6-10.

RECORDS: Evidence. See APPEAL, 9. EVIDENCE, 6, 8, 9. STATUTES, 1.

REFERENCE.

Findings of fact by a referee should not be disturbed by the trial court, or by the supreme court on appeal, unless they are against the clear preponderance of the evidence. *Remington v. Eastern R. Co.* 154

RELEASE. See MORTGAGES. PARTNERSHIP, 1-5.

REMEDIES: Changes. See CONSTITUTIONAL LAW, 5-7.

REMISSION. See DAMAGES.

REPLEVIN. See EXECUTORS.

RES ADJUDICATA. See JUDGMENT, 5. SALES, 10.

RESCISSION. See BANKS, 5. CONTRACTS, 5-7. SALES, 7.

RESIDENCE. See CRIMINAL LAW, 6. PAUPERS.

RESIGNATION of district treasurer. See SCHOOLS, 1, 2.

RESTITUTION, Writ of. See LANDLORD AND TENANT, 3-7.

RETURN. See CERTIORARI.

REVERSAL. See APPEAL, *Affirmance and Reversal.*

RIPARIAN OWNERS. See WATERS, 6, 7, 11, 13, 14, 16, 19.

ROADS AND STREETS. See HIGHWAYS. MUNICIPAL CORPORATIONS, 15-18.

RULES OF COURT.
Supreme Court Rule XX (Briefs on rehearing), 377.
Circuit Court Rule XXIX (Divorce: Pleading), 233.

SALARIES. See CONSTITUTIONAL LAW, 4. MUNICIPAL CORPORATIONS, 7-10.

SALES.

Evidence of expenses incurred by vendee: Shortage in weight.

1. Where defendant was liable to his vendee for the cost of new bags and the rebagging of peas in a warehouse, evidence showing merely the total amount of the warehouse charges, including storage for which defendant was not liable, did not establish the amount of his liability. *Liebermann v. Lippert,* 1
2. Testimony of the vendee that one to whom he had sold the peas made a demand of him for such charges specifically, being objected to, was evidence only of the fact of the demand, and did not tend to prove that the expenses specified had been incurred. *Ibid.*
3. The burden of showing a shortage in the guaranteed weight of peas sold while stored in a warehouse was upon the vendee and was not shifted by evidence that three months after the sale there was a shortage, where it appeared that in the interval the peas had been handled over and rebagged, giving abundant opportunity for change in their condition and amount. *Ibid.*

Warranty: Breach: Damages: Evidence.

4. The purchaser of a threshing-machine engine warranted to be in good working condition may retain it and recoup against the purchase price the damages which its defective condition imposed upon him, such as for the wastage of time of himself and his threshing crew in the actual effort to use the machine, upon the vendor's solicitation that he do so; for the value of his own time in reasonable efforts to remedy the defects; and for the amount paid for the hire of another engine for a few days to do the work for which the engine would have served had it been as warranted. *Optenberg v. Skelton,* 241

5. In such a case the jury, by special verdict, awarded the purchaser damages for loss of earnings, caused by defects in the engine, during the time it was actually operated, but the court rejected the allowance as too remote. *Held,* that the admission of evidence of such damages, and permitting the jury to find thereon, was not prejudicial to the vendor. *Ibid.*

6. The trial court in such a case submitted to the jury questions as to the value of the purchaser's time spent in thirteen trips to get the engine repaired and in six days trying to repair it, and included the amounts found by the jury in the judgment, but the question whether so much time was in fact consumed was not submitted. *Held,* equivalent to a decision that it was established without dispute that the amount of time stated in the questions was actually so spent. *Ibid.*

Same: Pleading: Election between claims.

7. In an action to recover for a heating plant, where defendant had counterclaimed for the amount he claimed to have paid thereon, he was properly required, at the close of the testimony, to elect whether his claim would be for a breach of warranty or a rescission of the contract. *Martin v. Eastman,* 286

8. The complaint in such case alleged sale and delivery of a furnace and a certain amount of piping and radiation previously selected and designed by defendant. Defendant, by way of answer and counterclaim, set up an express warranty to heat the house, and a breach thereof. This was denied in the reply. Upon the trial of such issue plaintiff's evidence tended to show an express refusal to warrant, and the jury found that there was no warranty. *Held,* that defendant was not in a position to claim error for failure to submit to the jury the question of an implied warranty of suitableness. *Ibid.*

Same: Notice of defects: Waiver: Warranty construed.

9. A contract of sale of a traction engine provided that the vendee should give written notice of any failure of the machine to satisfy the warranty, to the vendor and also to the agent from whom it was received; that notice to either alone should not be sufficient; and that no agent should have power to waive any of the conditions of the contract. In an action by the vendee for breach of warranty, a failure to show that such notice was given to the agent from whom the machine was received is *held* fatal to a recovery, although the notice was given to an agent higher in authority and to the vendor. *Trapp v. New Birdsall Co.* 543

10. Where the notice given in such a case was, on a former appeal, held insufficient as a matter of law, that decision was binding upon a second trial, the evidence being the same. *Ibid.*

11. If the vendor of a machine acts in respect to remedying defects therein without the notice which the contract of sale calls for, such conduct waives the giving of any notice other than that upon which it is based; but the mere fact that an agent of the vendor visited the machine and attempted to make it work properly, after an insufficient notice had been given, without proof that he was sent by the vendor or that the vendor had knowledge of his conduct, does not show a waiver of the required notice, especially where the contract provides that no agent shall have power to waive any of its provisions. *Ibid.*

12. In an action for breach of warranty that a traction engine sold to plaintiff was "capable of doing as much and as well as other machines of like size and proportions," the admission of evidence and submission of the case to the jury on the theory that the warranty covered a fault in the size of the boiler, in that it was not large enough to enable the machine to develop as much power as other machines of the same nominal horse power, was error. *Ibid.*

Same: Soundness of horse: Special damages.

13. If at the time of the delivery of horses to a purchaser they had contracted the distemper, although the disease did not develop until after they came into his possession, they were unsound within the meaning of a warranty of soundness. *McCann v. Ullman,* 574

14. In such a case the purchaser may recover for loss occasioned by the distemper being communicated to his own horses by those purchased, if special damages in that respect are properly pleaded and proven. but loss occasioned by the interruption of the purchaser's business due to the sickness of those horses, is not a proper element of damages, in the absence of allegations of special damage in that respect. *Ibid.*

Sale of grain for future delivery: Gambling: Burden of proof.

15. To uphold a time contract for the sale and delivery of grain upon a board of trade, it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as a cover for a gambling transaction. *Barnard v. Backhaus,* 52 Wis. 593, followed. *Bartlett v. Collins,* 477

16. The rule as to burden of proof, laid down in *Barnard v. Backhaus,* 52 Wis. 593, was not changed by the subsequent enactment of sec. 2319*a*, Stats. 1898. *Ibid.*

Sale of standing timber. See LOGS AND LOGGING.

Sale of land. See VENDOR AND PURCHASER.

SCHOOLS AND SCHOOL DISTRICTS.

1. Although secs. 961, 962, Stats. 1898, if unaffected by other provisions, would seem to permit a school district treasurer to resign at will and thus create a vacancy in the office, yet the specific provision of sec. 443 that "he shall hold office until his successor be elected or appointed and qualified as herein provided" must govern; and he cannot vacate his office, therefore, either by abandonment, acceptance of an incompatible office, or resignation. *State ex rel. Wheeler v. Nobles,* 202

2. Under sec. 443, Stats. 1898, providing that the clerk of a school district shall not hold the office of treasurer, a treasurer cannot, by

attempting to resign and by accepting the office of clerk, become eligible to the latter office until his successor as treasurer has been chosen and has qualified. *Ibid.*

3. Where territory in the town of A. is taken from a joint school district comprising territory in A. and L. to form part of a new joint district in A. and S., the supervisors of A. and L. are the only persons who, under sec. 420, Stats. 1898, have the right to participate in determining the amount which the old joint district should pay to the new one by reason of retaining the property; and a determination of that question by the supervisors of A. and S. is a nullity. *State ex rel. Joint Sch. Dist. No. 8 v. Joint Sch. Dist. No. 1,* 313

4. In an action brought by taxpayers against a school district and others, the complaint alleged that the school board had, for a valuable consideration, unlawfully and with a fraudulent purpose entertained by both the board and other defendants, purchased from the latter certain land for a school-house site; and a part of the relief demanded was a rescission of the purchase and the return to the school district treasury of the consideration paid therefor. *Held:*

(1) The assertion of a valuable consideration was a sufficient allegation that moneys of the district had passed to the vendors in pursuance of the unlawful and fraudulent purpose entertained by them.

(2) The facts stated would warrant equitable relief against said vendors, especially in view of the adverse attitude of the school board, which renders necessary a suit in equity by taxpayers, instead of a direct action at law by the district to recover the money paid.

(3) There was no misjoinder of causes of action, although a contract between the board and another defendant for the erection of a school-house on said site was alleged, and an injunction restraining all further proceedings was prayed for.

(4) The fact that all the officers of the district were participants in the wrong complained of, rendered unnecessary any prior demand upon the district to proceed for the relief sought. *Egaard v. Dahkle,* 366

SEALS. See CORPORATIONS, 16.

SEPARATION. See HUSBAND AND WIFE, 1–3.

SERVICE of summons. See JUDGMENT, 2. PROCESS.

SETOFF. See CORPORATIONS, 18.

SETTLEMENT. See PARTNERSHIP, 1–5. PAUPERS.

SHERIFFS AND CONSTABLES. See CONSTITUTIONAL LAW, 4. LANDLORD AND TENANT, 3–7.

SIGNATURES. See DEEDS, 4, 5.

SOLDIERS' RELIEF FUND. See PAUPERS, 1.

SPECIAL VERDICT. See APPEAL, 17. MASTER AND SERVANT, 9. TRIAL, 4, 5.

SPECIFIC PERFORMANCE. See ARBITRATION, 3. VENDOR AND PURCHASER, 3.

STATE AND FEDERAL COURTS. See BANKRUPTCY.

STATUTE OF FRAUDS. See LANDLORD AND TENANT, 1. LOGS AND LOGGING, 1. MORTGAGES. VENDOR AND PURCHASER, 1, 2.

STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES.

Enactment: Presumption as to contents: Legislative journals.

1. The journals of the two houses of the legislature may be referred to by courts as to the steps taken by the legislature in the passage of bills, and they are generally conclusive in that regard. They are not thus effective as to the contents of a law when such contents are called in question. In such a case the presumption is that the contents of a law, as found in the official publication thereof, are the same as when it passed the legislature, and that it was constitutionally passed. If it be challenged upon either ground, the question presented is one of law to be solved by the court in the same way that other legal questions are solved. In reaching a conclusion the court may examine the journals of the legislature as to what it did in the passage of the law; and as to the contents thereof it may go further and examine the original bill, or go to any other source of information that may be judicially considered trustworthy. *Milwaukee County v. Isenring,* 9

Time of taking effect: "From and after" publication. See STATUTES, 4.

2. Publication of an act of the legislature prior to its taking effect being for the purpose of enabling persons affected to shape their course accordingly, a provision therefor in the form, the act shall take effect from and after publication thereof, is consistent with such words being used exclusively and inconsistent with their being otherwise used. *O'Connor v Fond du Lac,* 253

Constitutionality. See CONSTITUTIONAL LAW. JUSTICES' COURTS, 5. MUNICIPAL CORPORATIONS, 1–6. STATUTES, 5.

General and special or local laws. See CONSTITUTIONAL LAW, 1–3.

Declaratory of common law: Effect of repeal.

3. A well-established principle of the common law is not abrogated by the repeal of a statute merely declaratory thereof. *Chippewa Falls v. Hopkins,* 611

Construction. See ADVERSE POSSESSION, 4–12. APPEAL, 3, 12. BANKRUPTCY, 6. BANKS, 3, 6, 10. CRIMINAL LAW, 3. EVIDENCE, 10. EXECUTORS. FISH AND FISHING. FORFEITURES. GARNISHMENT, 2, 3. HIGHWAYS, 1. HUSBAND AND WIFE, 2. INSURANCE, 3. JUDGMENT, 1, 3. JUSTICES' COURTS, 2, 5. LIMITATION OF ACTIONS, 1–3, 6. MUNICIPAL CORPORATIONS, 1, 7, 19, 20. PAUPERS. PROCESS, 2. PUBLIC LANDS. SALES, 16. SCHOOLS, 1–3. WATERS, 17. WITNESSES, 1.

4. The words "from and after," used in a statute in regard to time, are ordinarily held to signify exclusion of the day from which reckoning is to be made; and such meaning should prevail in the absence of some clear legislative intent to the contrary. *O'Connor v. Fond du Lac,* 253

5. In the construction of a statute no presumption arises in favor of either of two purposes in its enactment which are equally in disobedience of the constitutional duty of the legislature. *Trogman v. Grover,* 393

STATUTES CITED, ETC.

CONSTITUTION OF WISCONSIN.

Art. I, sec. 7 - 506, 512, 514
" I, " 12 - - 208, 210
" IV, " 18 9, 11, 13–15, 18–20, 23
" IV, " 23 - - 10, 28
" VII, " 2 - - 393, 395
" VII, " 15 - 393, 395, 396
" VII, " 21 - 9, 12–15, 19, 20
" IX, " 1 - - - 511
" XIII, " 9 - 254, 264, 266, 269
" XIV, " 13 - - - 616

SESSION LAWS.

1858. Ch. 49 - - - - 220
1861. " 88 - - - - 220
1876. " 364 - - - 11, 21, 24
1877. " 192 - - - - 237
1877. " 227 - - - 11, 21, 24
1878. " 137 - - - 11, 24
1882. " 318 - - - - 563
1883. " 152, subch. XVIII, sec. 5 - - 257
1883. " 183, subch. I, sec. 1 - 210
1883. " 183, " VII, secs. 1, 10 - - 210
1885. " 164 - - - - 614
1885. " 441, subch. V, sec. 24 - - 580, 586
1887. " 128 - - - - 393
1887. " 128, sec. 5 - - 394, 396
1887. " 128, " 9 - - 394, 395
1887. " 128, " 153 - - 394
1889. " 235 - - - - 566
1891. " 22 - - - 393, 394
1891. " 59 - - - - 209
1891. " 59, subch. VII, secs. 1, 10 - - 210
1891. " 59, subch. XXI, secs. 4, 5 - - 210
1891. " 59, subch. XXI, sec. 6 - - - 211
1891. " 124 - - - - 620
1891. " 124, sec. 9 - - 621
1891. " 124, " 11 - 618, 621
1891. " 124, " 13 - - 621
1891. " 124, secs. 15, 21 618, 621
1895. " 86 - - - 316, 320
1895. " 164, subch. IV, sec. 5 614
1895. " 216 - - 520, 523, 526
1897. " 9 - - - - 681
1897. " 172 - - - - 681
1897. " 247 - - 254, 260, 268
1897. " 247, secs. 2, 6 - - 262

SESSION LAWS — con.

1897. Ch. 247, sec. 7 - - 268
1899. " 82 - - - 574, 576
1899. " 231 - - - - 338
1899. " 311, sec. 15 - 507, 518

REVISED STATUTES OF 1849.

Ch. 10, secs. 3, 4, 8–15 - - 512
" 141, sec. 7 - - - - 513

REVISED STATUTES OF 1858.

Ch. 13, secs. 3, 4, 8–15 - - 512
" 15, " 79, 80 - - - 223
" 19, sec. 85 - - 615, 617
" 172, " 7 - - - 513

REVISED STATUTES OF 1878.

Section 7 - - - - 513
" 8 - - - 511, 517
" 1294 - - - 616, 617
" 1339 - - - 259, 260
" 1499 - - - 351, 522
" 1501 - - - - 351
" 1512 - - - 522–528
Sections 1513, 1514 350, 522, 524, 525
Section 1517 - 522, 524, 526–528
" 1777 - - - - 563
Sections 2899, 2902 - - 271, 273
Section 3221 - - - - 417
Sections 3314–3347 (ch. 143) - 217
Section 4618 - - - - 513
" 4719 - - - - 681

S. & B. ANNOTATED STATUTES.

Section 1773 - - 99, 100, 104
" 4243 - - - 529, 531

STATUTES OF 1898.

Section 7 - - - - 513
" 8 - - 506, 511, 517
" 69, subd. 2 - - 403
" 420 - - - 313, 315
" 431 - - - - 205
" 433a - - - 207
" 443 - - 202, 204, 205
Sections 676, 682, 683 - - 224
Section 824 - - - - 225
" 961 - - 202, 204–206
" 962 - - 202, 205, 206
" 1210b - - - - 225
" 1273 - - - 233, 239
" 1326 - - - 237, 238
" 1339 - - - - 253
" 1492f - - - 574, 576

STATUTES CITED, ETC.—con.

STATUTES OF 1898—con.

Section 1499 - - - 333, 345
" 1500 - - - - 333
" 1500, subd. 4 - 330, 332
" 1501 - - - 333, 345
Sections 1502–1511 - - - 333
Section 1512 - - 333, 525, 528
Sections 1513–1516 - - - 333
Section 1517 - - - 332, 528
Sections 1518–1529 - - - 332
Section 1529a - - 330, 332
Sections 1529b, 1529c 330, 332, 333
" 1529d–1529i - 330, 332
Section 1607a - - - 539
" 1697 - - - 408, 414
" 1748 - - - - 498
" 1767 - - - - 498
" 1773 - - - - 104
" 1775 - - - - 498
Sections 1777–1777d - - 563
Section 1816b - - - - 253
" 1941—43 - 373, 375, 376
" 1941—44 372, 373, 375–377
Sections 1941—45 to 1941—62 373, 375, 376
Section 1941—64 - - - 376
" 1943 - - 372, 375–377
" 2024, subsecs. 18, 19 [pp. 1528, 1529] 136, 146
" 2024, subsec. 19, subd. 5 [p. 1529] - 146
" 2024, subsec. 47 [p. 1537] 137, 140, 149, 150
" 2077 - - - 108, 116
" 2317 - - - 77, 84
" 2319a - - 478, 481, 484
" 2347 - - - 48, 51
" 2364 - - - - 232
" 2525 - - - 398, 402
" 2604 - - - - 196
" 2609a - - - - 374
" 2610 - - - - 655
Sections 2639, 2640 - - 639, 642
Section 2646 - - - - 596
" 2647 - - - 570, 571
" 2654 - - - 258, 259
" 2656 - - - - 306
" 2668 - - - - 596
" 2762 - - - - 668

STATUTES OF 1898—con.

Section 2766 - - - 667, 666
" 2769 - - - 632, 634
" 2772 - - - 650, 667
" 2801 - - - 655, 656
" 2829 - - - - 656
" 2870 - - - - 647
" 2873 - - - - 168
" 2883 - - 152, 366, 369
Sections 2920, 2921 - - - 666
Section 2949 - - - 650, 669
" 2982, subd. 15 - - 667
" 2988 - - - - 635
" 3049 - - 117, 121, 668
" 3068 - - - - 643
" 3069, subd. 2 - - 120
" 3069, " 3 - 636, 639
" 3070 - - 171, 177, 668
" 3187 - - - - 286
" 3227 - - - 152, 154
" 3295 - - - 233, 238
" 3298 - - - 233, 237
" 3313 - - - - 240
" 3315 - - - - 122
" 3331 - - - - 572
" 3572 - - - - 290
" 3626 - - - - 286
" 3626, subd. 4 - - 290
" 3719 - - - - 635
" 3725 - - - 632–634
" 3727 - - - 632, 634
" 4069 - - - - 4, 8
" 4210 - - - 420, 440
" 4211 - - 420, 440, 443
" 4212 - - 428, 439, 440
" 4213 420, 440, 442, 444, 445
" 4214 - 420, 421, 440–444
" 4219 - - - - 30
" 4222 - - 29, 30, 413, 414
" 4252 - 409, 414, 417, 418
Sections 4255, 4256 - - 94, 95
" 4424, 4425 - - - 485
" 4466a, 4466b - - 464
" 4532, 4535, 4538 - - 485
Section 4561a - - - - 508
" 4568 - - - - 464
" 4618 - - - - 513
" 4719 - - - - 681
" 4721 - - - - 508

STOCK AND STOCKHOLDERS. See BANKS. CORPORATIONS.
STREETS. See MUNICIPAL CORPORATIONS, 15–18.
SUBCONTRACTORS. See LIENS, 1.
SUCCESSION. See CORPORATIONS, 18.
SUMMONS, Service of. See JUDGMENT, 2. PROCESS.

SUPREME COURT.

See APPEAL AND ERROR.

1. "The original jurisdiction of the supreme court extends to all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *In re Court of Honor of Illinois,* 625

2. If any given case satisfies the test above indicated, the court may exercise its jurisdiction or not as it sees fit, where the circuit court has concurrent jurisdiction. *Ibid.*

3. In a case falling within the original jurisdiction of the court, the general rule is not to exercise it where the primary right to be vindicated is of a private nature, though the question involved is *publici juris,* and even though a state officer is a party. *Ibid.*

4. No departure from the general rule indicated will be made unless the circumstances are of such an extraordinary character that adequate relief cannot be obtained by first resorting to the jurisdiction of the circuit court. Mere delay, or even irreparable loss to a private person, will not necessarily be deemed sufficient. *Ibid.*

SURETYSHIP. See EXECUTORS. GUARANTY.

SURVEYS. See BOUNDARIES. PUBLIC LANDS. WATERS, 9.

TACKING. See JUDGMENT, 3, 4.

TAXATION.

Where no evidence under oath is given or offered before the board of review upon an application to reduce an assessment, the board has no power to reduce the valuation. *State ex rel. Heller v. Fuldner,* 56

TITLE to land. See ADVERSE POSSESSION. DEEDS. EQUITY. HUSBAND AND WIFE, 5–7. MUNICIPAL CORPORATIONS, 15–18. VENDOR AND PURCHASER. WATERS.

TORTS. See BANKS, 7. BOUNDARIES, 1. CONSPIRACY. LANDLORD AND TENANT, 3–7. LIMITATION OF ACTIONS, 1–3. MASTER AND SERVANT, 8–12. NEGLIGENCE. RAILROADS.

TOWNS. See HIGHWAYS. JUSTICES' COURTS, 4.

TRANSACTIONS WITH DECEDENTS. See WITNESSES, 1.

TRIAL.

Place of trial. See CONSTITUTIONAL LAW, 8.

Presence of accused: Record. See CRIMINAL LAW, 9.

Selection of jury. See CRIMINAL LAW, 1–7.

Evidence: Examination of witnesses. See EVIDENCE. WITNESSES.

Same: Objections: Purpose: Duty to explain rulings.

1. The purpose of objections to questions on the examination of a witness is not solely to enable the objecting party to insist on error in the appellate court, but is in part to enable the counsel who is conducting the examination to avoid error and more effectually prove his case or defense. *Colburn v. C., St. P., M. & O. R. Co.* 377

2. Where counsel on either side is unable to comprehend the reason for excluding evidence, and in good faith appeals to the court to indi-

cate specifically such reason in order that he may frame his questions in such a manner as to meet such ruling, it becomes the duty of the court to do so. *Ibid.*

Court and jury: Relative functions. See ADVERSE POSSESSION, 10-12. APPEAL, 6, 17. BOUNDARIES, 2. CORPORATIONS, 4. HIGHWAYS, 3, 4. SALES, 6.

3. If all the issues of fact raised by the pleadings, that are controverted on the evidence, are submitted to the jury for determination, the omission to submit other issues is not reversible error. *Bullen v. Milwaukee Trading Co.* 41

Instructions to jury. See APPEAL, 7, 8, 15. NEW TRIAL, 2.

4. It is error for the trial court to state to the jury the legal effect of their answer to a question in the special verdict. *Sheppard v. Rosenkrans,* 58

5. Where a case is submitted to the jury for a special verdict, it is error to give instructions applicable only to a general verdict. *Bartlett v. Collins,* 477

Verdict. See APPEAL, 17. CRIMINAL LAW, 2. DAMAGES. MASTER AND SERVANT, 8, 9.

Findings of fact by court. See APPEAL, 6, 18. DIVORCE, 2. VENDOR AND PURCHASER, 2.

New trial. See NEW TRIAL.

TRUSTS AND TRUSTEES. See CORPORATIONS, 10, 11. EQUITY. WILLS.

ULTRA VIRES. See MUNICIPAL CORPORATIONS, 12. WATERS, 14.

UNDERTAKING. See APPEAL, 5.

VENDOR AND PURCHASER OF LAND.

See DEEDS. HUSBAND AND WIFE, 5. LOGS AND LOGGING. WATERS, 14.

1. Oral authority is sufficient to empower an agent to make a written contract for the sale of land. *Brown v. Griswold,* 275

2. In an action to enforce specific performance of a written contract for the sale of land, made by an agent who had only oral authority, the only disputed question of fact was whether the agent had been given authority to sell or only to find a customer. The first seventeen findings of the court were mere recitals of the testimony and correspondence of the defendant and the agent. The eighteenth finding was that the agent had not been authorized by defendant to execute the contract sought to be enforced. A question largely debated before the trial court was whether oral authority could suffice to empower the agent to make a written contract for the sale of land. The evidence preponderated in favor of the view that the agent had been given authority to sell. *Held,* that said eighteenth finding, being ambiguous, would be construed merely as a conclusion that oral authority to sell land was not authority to execute a binding contract for its sale, and not as a finding that the agent had not been given authority to sell. *Ibid.*

3. After the commencement of an action to compel specific performance of a contract for the sale of land, the defendants disabled themselves from making an effective conveyance by conveying the land to a purchaser upon whom the notice of *lis pendens* had been served. *Held,* that a decree in plaintiff's favor should be such that of its own force it will transfer to him all of the title

which the defendants had at the time of the commencement of the suit, whether now vested in them or in some person claiming under them subsequent to that date. *Ibid.*

4. In an action to foreclose a land contract, judgment by default was entered adjudging a foreclosure in case the defendant failed to pay the amount due, including taxes, etc., and also the value of improvements made by a subsequent purchaser from the vendor. Thereafter an assignee of the defendant intervened and asked that the provision as to payment for improvements be stricken from the judgment and that he have such other relief as might be equitable. *Held*, that it was within the discretion of the court to set aside the judgment entirely and grant a new trial, with leave to the plaintiffs to amend their complaint in respect to the improvements. *Allen v. Coe*, 635

5. A judgment granting foreclosure of a land contract only in case the defendant failed to comply with certain conditions, among which was the payment for improvements made by a subsequent grantee of the vendor, does not grant relief in excess of the prayer of the complaint that defendant be entirely excluded from any interest in the land, and that plaintiff's title be quieted. *Ibid.*

VENUE. See CONSTITUTIONAL LAW, 8.

VERDICT. See APPEAL, 17. CRIMINAL LAW, 2. DAMAGES. MASTER AND SERVANT, 9. TRIAL, 4, 5.

VETERINARY EXPERT. See EVIDENCE, 10.

VOLUNTARY ASSIGNMENT. See BANKS, 9, 12, 13.

WAIVER.
Of condition precedent. See ACTION, 1-3.
Of right to dispute facts. See APPEAL, 13.
Of want of jurisdiction. See APPEARANCE.
Of costs. See BANKRUPTCY, 4 (c).
Of defense. See BANKRUPTCY, 4 (d).
Of stipulation as to extras. See BUILDING CONTRACTS.
Of condition as to notice. See LANDLORD AND TENANT, 2.
Of notice of defects. See SALES, 11.

WARRANTY. See SALES, 4-6, 8, 14.

WATERS.

See ADVERSE POSSESSION, 11. ARBITRATION, 2, 3. PUBLIC LANDS.

Title to land covered by water: Lakes: Adverse possession.

1. Land covered by the waters of lakes or ponds, or by water partaking of like character as regards public rights, though in form conveyed by a federal or state patent, is vested in the state the same after such conveyance as before, such conveyance, as to such land, being absolutely void. *Illinois Steel Co. v. Bilot*, 418

2. The title to land of the character mentioned, in the territory out of which the state of Wisconsin was formed, prior to such formation, was in the United States in trust to preserve to the people of prospective states the enjoyment of the waters covering the same to the line of ordinary high-water mark, to the same extent as tidal waters are enjoyable by the rules of the common law. When this state was admitted into the Union such trust as to such land within the boundaries devolved upon it and there remains, for it

is powerless to divest itself of the trust so far as its preservation is necessary to maintain in all its integrity the character of such waters. *Ibid.*

3. The presumption as regards land covered by water of the character above indicated is that the trust mentioned attached thereto before the government survey was made, and that the extension of such survey over and the conveyance of such land in form was void; or that a trust of a like character attached to the land by reason of the shore line being extended by erosion. *Ibid.*

4. The title to land held by the state in trust to preserve to the people thereof the enjoyment of lakes and ponds does not change by artificial filling so as to raise the surface above the level of the water. *Ibid.*

5. Adverse possession of land covered by water, which is the subject of private ownership, may be acquired by any means which actually and notoriously exclude the true owner therefrom, effectually disseising him thereof. Other means than physical exclusion by residence thereon or by inclosing the same will accomplish it. *Ibid.*

6. The mere ownership of the shore, where title stops at the water's edge by reason of the public character of such water, does not entitle one to maintain ejectment to obtain possession of land beyond the water's edge. *Ibid.*

7. Private interests in land, if there be any below the line of ordinary high-water mark of public waters, is *prima facie* incident to the ownership of the shore, and if title to the latter be divested from one by adverse possession, the interests which are incidental thereto pass with it. *Ibid.*

8. A *prima facie* paper title in plaintiff, established in an action of ejectment, does not entitle him to recover as a matter of law in the face of evidence tending to show that the premises in controversy are not subject to private ownership because of being part of the bed of a lake. *Ibid.*

9. Though the government survey and plat of premises in controversy shows them to be upland, and the mapping thereof into lots and blocks by a person claiming to be the owner indicates the same, the physical situation, as to whether such premises are or are not a part of the bed of a lake, will prevail. *Ibid.*

10. It is not necessary that a particular locality should be wholly covered by water constantly, or be covered sufficiently to be susceptible of navigation, to give thereto the character of a lake bed as regards title thereto. If a body of water is not a river, yet is reasonably constant in character, it is a pond or lake, and the limits thereof are the natural shore though water does not constantly stand at that point. *Ibid.*

11. If a plaintiff in ejectment establishes *prima facie* paper title to the *locus in quo*, he is not entitled to recover as a matter of law in the face of evidence tending to show that the premises are submerged by water and are appurtenant to a shore the title to which has been divested from the true owner, so called, by adverse possession. *Ibid.*

Riparian rights: Purprestures: Abatement.

12. A structure built upon the bed of a lake, not in aid of navigation, such as a building in which to store and repair boats, is a purpresture. *Att'y Gen. ex rel. Askew v. Smith,* 532

13. A pier may lawfully be built by a riparian owner in aid of navigation, through shoal water to navigable water; but if built by one not a riparian owner it is a purpresture. *Ibid.*

14. Where the owner of a lot bordering on a lake conveys the lake end thereof, including the shore, to a railway company in fee simple, he ceases to be a riparian owner. Even if the company has no power to acquire a fee in its right of way, but only an easement, yet the conveyance of the fee to it transfers the title and is valid until assailed in a direct proceeding by the government. *Ibid.*

15. A mere purpresture is liable to abatement in a suit in equity by the attorney general, though it is not a public nuisance. *Ibid.*

16. In an action to compel the removal of a boat house and pier in a lake, the attorney general filed a complaint which sought enforcement of the rights of the state and the private rights of the relator, an alleged riparian owner, as well. The proofs showed that the structures were purprestures though not a public nuisance, but showed that the relator was not a riparian owner and suffered no private injury. The attorney general did not appear in court on the trial, but made no attempt to withdraw the complaint or discontinue the action. *Held*, that judgment requiring the removal of the purprestures should have been rendered. *Ibid.*

Dams: Flowage of lands.

17. A corporation organized to build and maintain a dam across a river for hydraulic and manufacturing purposes and to improve the river and facilitate the running of logs therein, acquired a franchise, previously granted by the legislature, under which it had power to secure flowage rights under sec. 1777, R. S. 1878, as amended by ch. 318, Laws of 1882 (Stats. 1898, secs. 1777–1777*d*), and erected its dam pursuant to such franchise. In proceedings under said sec. 1777 to obtain compensation for the overflowing of lands by such dam, *held*, that the corporation cannot be heard to say, as a reason why commissioners of appraisal should not be appointed, that the dam was built higher than was absolutely necessary to accomplish the particular purposes mentioned in said section, i. e. the improvement of the stream and driving logs therein, and that the overflowing of the lands in question was not necessary for those purposes. *Charnley v. Shawano W. P. & R. I. Co.* 563

18. Although a dam across a navigable stream, constructed without authority from the state, may be a public nuisance, and the persons who have constructed it cannot, as against the public, acquire a prescriptive right to maintain it, yet if the dam overflows the land of a private person its proprietors may acquire rights of flowage by prescription the same as though the dam had been authorized by the state. *Ibid.*

19. A dam built and maintained, without legislative authority, by a riparian owner on a stream navigable only for the purpose of floating logs, is not unlawful if it does not materially affect or abridge the beneficial use of the stream. *Ibid.*

WILLS.

1. By one clause of a will drawn by a testator who had devoted almost his entire life to educational work, he gave to his wife, to hold in trust for his infant son and such other parties as might be named

in the will, all his property, of the value of about $21,000, including his homestead worth $8,000. He also named his wife as executrix of the will and trustee for the purposes therein named, and by another clause "devised as aforesaid" all his property to his said executor and trustee, to provide for the care and maintenance of said son and of such other children (if any should be born) as might survive him, and directed that when said son attained his professional degree she assign to him such sum out of the proceeds of the estate as might be of help in starting him in the practice of his profession, and at the same time be within the limits of her ability to relinquish from *her estate* without detriment to the other children, if any. He also provided that in case there were other children she might, upon their attaining majority or marrying, assign to them such part of *his estate* as she might deem needful and within her ability to relinquish. There were no other children and no other persons named in the will as objects of the testator's bounty. The relations between the testator and his wife were cordial, and the terms of the will show that he had confidence in her business ability and judgment, but no specific provision was made for her, and she was possessed of no property of her own. *Held*, that the intention of the testator was to bequeath to his wife both the legal estate and the beneficial interest in all his property, subject only to the trust imposed for the benefit of the son. *Davies v. Davies*, 129

2. Testamentary trustees who are given a portion of the testator's estate to hold and administer for the benefit of persons in existence and also for the ultimate benefit of yet unascertained persons, including unborn children, may appeal from an order or judgment for the distribution of said portion, even though all the persons in existence who are beneficially interested in the conduct of the trustees consent to such distribution. *In re Luscombe's Will*, 186

3. In such a case one of the joint trustees who believes that the judgment deprives the trust estate of property belonging to it has power to appeal, notwithstanding the refusal of his co-trustee to join with him; and if all parties in interest, including such co-trustee, are before the appellate court it may consider the merits of the appeal. *Ibid.*

4. The trustee so appealing acts in peril of being denied reimbursement of his expenses if his appeal is not taken in good faith and upon reasonable grounds. *Ibid.*

5. A testator, after certain specific legacies, gave the residuum of his estate to his executors in trust to be invested and a part of the income paid to his son during life. He expressly declared that his intention in making such provision was to secure to said son the necessaries of life, so that said income or estate could not be in any way controlled or disposed of by him or taken by his creditors. He directed that, in case any proceedings should be instituted for the purpose of reaching the income so provided for and of diverting it from the object intended by him, and a decree or judgment obtained for that purpose, then all payments from the income to the son should cease and, if there were no lawful issue of the son living, the trustees should distribute the property to the wife and a daughter of the testator. *Held*, that this direction, even if it were in conflict with the declaration of the testator's purpose, would nevertheless be controlling because it is mandatory and because it is the later provision. It does not, however, nec-

essarily conflict with such general purpose, but merely implies a limit thereto. *In re Luscombe's Will*, 186

6. By a stipulation under which, after a contest, the will was admitted to probate, the said widow and daughter conveyed to the son any portion of the body of the estate which might come to them in the event of the termination of the trust as to him. Such trust having been terminated by the happening of the specified contingency, *held*, that it was properly adjudged that said portion of the trust estate had passed to and become vested in the widow and daughter, and payment thereof to the son was properly directed in accordance with the assignment to him contained in the stipulation. *Ibid.*

7. Before final settlement of the estate a judgment creditor of the son brought an action for the purpose of subjecting the son's interest in the income of said trust estate to the payment of his judgment, and obtained a decree in form to that effect. This was not done by said creditor with the purpose of avoiding the provisions of the will, but the son, knowing that it would have that effect, made no resistance to the action. *Held*, that thereby the contingency had happened upon which the trust as to the son was to terminate. The judgment was one obtained "for the purpose of reaching the income," within the meaning of the will, although the will itself put the income beyond the reach of such a judgment. *Ibid.*

8. The fact that the trustees were not made parties to such judgment does not render it ineffectual to terminate the trust. Though not binding on the trustees, it was binding on the son personally and could compel him under penalty for contempt to pay over the instalments of income as they were received. *Ibid.*

WITNESSES.

See EVIDENCE, 2, 7, 10.

1. A life insurance company does not sustain its liability on a policy from, through, or under the insured; and the plaintiff, in an action on the policy, is therefore not precluded by sec. 4069, Stats. 1898, from testifying to transactions between the insured and an agent of the defendant. *Chamberlain v. Prudential Ins. Co.* 4

2. Where a witness is not a party, cross-examination relating to matters not gone into on the direct examination is properly excluded. *Stubbings v. Curtis*, 307

WORDS AND PHRASES.

According to a map, in deed. See DEEDS, 6.
Agent authorized in writing, in statute. See FISH AND FISHING.
Boundary line, in statute. See PUBLIC LANDS, 1.
Claims or demands, in statute. See MUNICIPAL CORPORATIONS, 20.
Conspiracy. See CONSPIRACY, 2.
Corner, in statute. See PUBLIC LANDS, 1.
District wherein offense shall have been committed, in constitution. See CONSTITUTIONAL LAW, 8.
Due east and west, in statute. See PUBLIC LANDS, 3.
From and after, in statute. See STATUTES, 2, 4.
General law. See CONSTITUTIONAL LAW, 1–3.
Liability created by law, in statute. See BANKS, 10.
Lien created by law, in statute. See BANKRUPTCY, 6.

Local law. See CONSTITUTIONAL LAW, 2, 3.
Mistake. See ARBITRATION, 1.
Officers. See MUNICIPAL CORPORATIONS, 7.
Pauper, in statute. See PAUPERS, 1.
With the *privilege of four years more by giving notice,* in lease. See LANDLORD AND TENANT, 1.
For the *purpose of reaching the income,* in will. See WILLS, 7.
Shall be served, in statute. See LIMITATION OF ACTIONS, 2.
Sound, in warranty of horse. See SALES, 13.
Special law. See CONSTITUTIONAL LAW, 1-3.
Thereupon, in record. See NEW TRIAL, 1.
In trust, in will. See WILLS, 1.
Usual improvement, in statute. See ADVERSE POSSESSION, 8-10.
WRIT OF RESTITUTION. See LANDLORD AND TENANT, 3-7.

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